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REPORTS

OF THE

NATIVE APPEAL COURTS

1956 (2)

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

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CENTRAL NATIVE APPEAL COURT.

MOEKETSI *v.* **MOSEHLE.**

N.A.C. CASE No. 8 OF 1956.

JOHANNESBURG: 17th April, 1956. Before Wronsky, President, Menge and Garcia, Members of the Court.

MAINTENANCE.

Ordinance No. 44 *of* 1903 (*T*).—*Section* 15 *of Act No.* 38 *of* 1927.

Summary: The facts appear from the judgment. Appeal against the grant of judgment for defendant with costs in an action under Ordinance No. 44 of 1903, for the maintenance of an illigitimate child. A

Held: That the judgment is not appealable apart from the question of costs;

Held further: That the judgment is not a competent one and should be set aside under section *fifteen* of the Native Administration Act, 1927. B

Discussed: Whether a Native Commissioner who has, in proceedings under the Ordinance, refused to make a maintenance order, can be required to institute fresh proceedings against the respondent. C

Cases referred to:
De Souza *v.* Du Preez, 1952 (2) S.A. 379.
Mocke *v.* De Kock, 1932, C.P.D. 218.

Statutes etc., referred to:
Transvaal Ordinance No. 44 of 1903. D
Section 15 of Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Vereeniging.

Menge, Permanent Member, delivering the judgment of the Court:—

Some time ago the appellant, a Native woman, initiated proceedings under the Deserted Wives and Children Protection Ordinance, 1903, against the respondent, as a result of which the latter was ordered to maintain her child. The respondent appealed, and had the order set aside. This Court in allowing the appeal held that it had not been proved that the respondent was the father of the child, nor that he was in a position to support it and that there were certain other defects in the proceedings. Thereafter the present appellant again instituted proceedings against the respondent under the Ordinance. Some evidence was led and thereupon the respondent's attorney asked for absolution from the instance on the ground that the matter before the Court—presumably the question of the parentage of the child—was *res judicata*. E F G

The Native Commissioner upheld this plea and gave judgment for defendant with costs. The mother now appeals on the ground that this judgment is against the weight of the evidence, and that the Native Commissioner erred in holding that the matter was *res judicata*. H

Mr. Michel who appeared before us for the appellant relied solely on the submission that the matter was not *res judicata*. Counsel for the respondent argued that the appellant has exhausted her rights in the Court *a quo* at the first hearing and was not entitled to a fresh enquiry under the Ordinance. He also argued that the matter is not appealable.

The first question which arises is whether the appellant has the right to bring a matter of this nature on appeal. In De Souza *v.* Du Preez, 1952 (2), S.A. 379, which was cited by Mr. Michel this point was left undecided; but the learned judge did say: "it may very well be that the Legislature intended an appeal when an order is made against the father but if the magistrate finds that the person accused has not been proved by the girl who complained that he is (*sic*) the father of the child that the matter can go no further." But in the Cape, where similar statutory provisions apply, it was held in Mocke *v.* De Kock, 1932, C.P.D. 218, that no appeal lies, because the woman, having chosen not to bring an ordinary affiliation action, but to seek instead the intervention of the State on her behalf, is not in the position of a *dominus litis* and must (as was said in that case) "submit to being put aside by the State." Having regard to the wording of section 10 *bis* (3) of the Native Administration Act, 1927, as amended, there seems to be no reason why we should not consider ourselves bound by this decision. Of course, in so far as the Native Commissioner's award of costs in favour of the respondent is concerned, the appellant has the right to appeal. This aspect will be discused presently.

It follows then that the appeal against the judgment for defendant must fail; but that is not the end of the matter. The judgment which the Native Commissioner gave, quite apart from the order as to costs, cannot stand. In an ordinary civil case the Native Commissioner derives his power to give judgment for defendant from the Rules of Court (Rule 54). But Ordinance No. 44 of 1903 confers no such powers. Under the Ordinance the Native Commissioner can either make an order to pay maintenance or he can decline to do so. That is all. If he makes an order the defendant can appeal. The plaintiff, however, cannot appeal if he declines to make an order; but she has the right to bring an ordinary affiliation action, for the refusal to make a maintenance order cannot render the paternity issue *res judicata*. The refusal is as Mr. Michel pointed out tantamount to absolving the defendant from the instance or dismissing the complaint. It may be that the woman can even institute fresh proceedings under the Ordinance, as was done in this case after this Court had set the Native Commissioner's maintenance order aside. The Native Commissioner would not be able to hold that the matter is *res judicata;* but he may, conceivably, refuse to issue a second summons on the reasoning that, as the State has already investigated the complaint with a negative result, its duty has been done and he need not hold a fresh investigation.

We have the power under section *fifteen* of the Native Administration Act to set the Native Commissioner's judgment aside notwithstanding the failure of the appeal; but in regard to the order as to costs, this is appealable and to that extent the appeal is properly before us. As has been shown, the Native Commissioner's judgment for defendant is not possible under the Ordinance and it was also given for reasons which are bad in law. Consequently it should not carry costs and this part of his judgment, too, must be set aside.

The effect of so setting the Native Commissioner's judgment aside will be that the appellant's complaint, after a second investigation, has been dismissed in circumstances which do not carry costs, and that as far as the Native Commissioner is concerned the matter has been disposed of. The plaintiff still has her remedy in an ordinary common law affiliation suit.

In the result then the appeal is dismissed with costs; but the judgment of the Native Commissioner is set aside.

For appellant: Mr. R. I. Michel of Messrs. Helman & Michel.

For respondent: Adv. V T. Pienaar, i/b. Messrs. Coetzer & Hanekom, Vereeniging. A

NORTH-EASTERN NATIVE APPEAL COURT.

NXUMALO *v.* NDWANDWE.

N.A.C. CASE No. 2 OF 1956.

VRYHEID: 12th April, 1956. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

NATIVE LAW AND CUSTOM.

Practice and Procedure: Chief's Courts Rules.

Summary: Thirteen cattle were paid as *lobolo* but as the girl jilted the payer the cattle were returnable. That number of cattle were returned but four of them were not the originals but substitutes which were handed to the payer's representative, he being absent. On his return the payer immediately claimed back the four original animals but the girl's father pleaded that he had returned in full the number paid. Plaintiff (the payer) thereupon sued defendant (the girl's father) for the four head of cattle in a Chiefs' Court from the judgment of which appeal was made to the Native Commissioner's Court and subsequently to this Court. B C

Held (1): That to bring an appeal from a Chief's Court to a Native Commissioner's Court, Chiefs' Courts Rule No. 10 (1) (*c*) must be complied with and a proper notice as prescribed in Annexure B to the Regulations must be filed. D

(2): That as no prejudice was caused to either party by reason of the irregularity (failure to comply with Chiefs' Courts Rule No. 10 (1) (*c*) and there was no objection the Court will take no other action but express its stern disapproval of the disregard of the rule. E

(3): That if available the original cattle paid must be returned if they are returnable and cannot be substituted without agreement.

Statutes etc., referred to: F

Rule 10 (1) (*c*) Chiefs' Court Rules (Government Notice No. 2885 of 9th November 1951).

Appeal from the Court of the Native Commissioner, Nongoma.

Ashton (Permanent Member), delivering the judgment of the Court:— G

Plaintiff paid defendant thirteen head of cattle as *lobolo* for the latter's daughter but she jilted him and the cattle were returnable. They were in fact returned by defendant to plaintiff's representative while plaintiff was away at work but as soon as he got back after a year or two plaintiff saw that four of the thirteen animals were not those he had paid and he straightaway took steps about putting matters right. There followed certain H

interdict porceedings and condonation of late noting of the appeal with which this judgment is not concerned. An action was brought in the Chief's Court for the return of plaintiff's original four head of cattle and the Chief gave judgment for plaintiff whereupon defendant appealed to the Native Commissioner who dismissed the appeal but amended the judgment and now defendant has again appealed to this Court against that judgment.

At the outset it is necessary to point out that the Rules of Chiefs' Courts were not properly complied with and this Court wishes to remind officers dealing with Native Civil cases, litigants and their legal representatives that the Rules were promulgated for observance by them. In this instance section No. 10 (1) (*c*), of the Rules of Chiefs' Courts was completely ignored by the attorney representing the defendant when appealing to the Native Commissioner's Court from the Chief judgment and the Native Commissioner apparently overlooked the omission.

The Rule requires that a notice substantially in the form prescribed in Annexure B to the Regulations shall be issued by the Clerk of the Court and it is clear that when an appellant lodges his appeal through a legal representative it is the legal representative who prepares the notice so far as he can for completion by the Clerk of the Court.

The Native Commissioner in the Court below had no notice of appeal before him and apparently relied on what the attorneys for the parties told him and the Chief's reasons for judgment for the information regarding the claim in the Chief's Court. This was most irregular but as neither of the attorneys for the parties objected and as the irregularity has not apparently prejudiced either of the parties and it is not included in the grounds of appeal this Court will not do anything more than express its stern disapproval of the disregard of the Rules.

The pleadings as presented in the Native Commissioner's Court when the appeal was heard were as follows:—

Claim: "The claim is for the return of a particular four head of cattle paid on account of *lobolo*. Plaintiff tendered the return of four head which acceptance has been refused by the defendant."

Plea: "(1) Defendant admits having received four head of cattle on account of *lobola*.

(2) Defendant avers that he has refunded the equivalent of the claim in cattle to plaintiff who has originally accepted them and that plaintiff's acceptance constitutes a discharge of the debt and a novation of the original agreement.

Further in the alternative defendant pleads that plaintiff allowed him to dispose of the cattle so paid over and he is therefore now estopped for reclaiming them. Defendant therefore prays for dismissal of plaintiff's claim and judgment in his favour with costs. Defendant admits that at the time plaintiff made the claim the four head of cattle had not been returned to the plaintiff."

A late amendment to the claim was allowed whereby the return of the cattle or their value was claimed.

The Native Commissioner's judgment reads as follows:—

"Appeal dismissed with costs and Chief's judgment altered to read "For plaintiff for two original head of cattle in possession of the defendant and two others, viz. an ox and a cow or their value, viz. £36 and £25 respectively.";

and the grounds of appeal are as follows:—

"1. That the judgment is against the evidence and the weight of the evidence.

2. That the learned Native Commissioner erred in dismissing the appeal and yet altering the judgment of the Chief."

The second ground of appeal was abandoned in argument.

There can be no doubt that on the facts the Native Commissioner correctly found that thirteen head of cattle were paid as *lobolo,* that nine of the original cattle were returned as well as four substitutes and that the plaintiff had every right to return these four substitutes in exchange for his four original cattle which being *sisa* cattle should not have been substituted without his approval. It is true that plaintiff's representative took delivery of the returned cattle but he clearly had no mandate to receive other than the originals. The Chief's judgment so far as it can be gathered from his reasons for judgment was a correct one but it was clear that it was not enforceable as it stood as two of the original animals were not in defendant's possession when he gave his judgment. It was necessary therefore to grant an equivalent for them and this was done in the Native Commissioner's Court.

But although the judgment of the Chief as it was amended by the Native Commissioner was correct in principle, in effect it is wrong as it stands. The return by defendant to plaintiff of the two original animals and cash in lieu of the other two can only be rightly ordered against the return by plaintiff to defendant of the four substituted cattle.

Counsel agreed that the value of the two original cattle should be accepted as £20 each instead of £36 and £25 each should the appeal be dismissed.

In the result therefore it is ordered that the appeal be and it is hereby dismissed with costs but the following judgment is substituted for that pronounced by the Native Commissioner which is hereby deleted:—

> "The appeal from the Chief's judgment is dismissed with costs but his judgment is amended to read as follows: 'For plaintiff with costs for his two original animals and £40 being the value of the other original animals against the return by plaintiff of the four substituted animals and their progeny if any'."

For appellant: Mr. Havemann of G. D. Havemann & Co.).

For Respondent: Mr. H. L. Myburgh (i/b Davidson & Schreiber).

NORTH-EASTERN NATIVE APPEAL COURT.

NTANZI *v.* ZULU.

N.A.C. CASE No. 21 OF 1956.

VRYHEID: 12th April, 1956. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

NATIVE CUSTOM.

FEES OF OFFICE.

Rules of Chiefs' Courts—Fees—Chiefs and Chiefs' deputies—Natal Code of Native Law—Powers of Paramount Chief of the Zulus.

Summary: Plaintiff, a Chief, sued his Chief's deputy who had power to try civil cases for the fees paid to him in respect of the hearing of cases and in respect of the arrangements for celebrating customary unions.

A *Held* (1): There is nothing in the rules or regulations or in the Code laying down definitely what the relationship is between a Chief and his deputy in so far as Court fees are concerned and there was no evidence as to what a Paramount Chief's powers are.

B *Held* (2): According to Rule No. 13 of Government Notice No. 2885 of 1951, as amended, by Government Notice No. 1180 of 1953 the fees of a Chief's Court must primarily be paid to the Chief's deputy who tries the cases.

Held (3): The fees payable to a Chief by virtue of section
C No. 64 (1) of the Natal Code of Native Law (Proclamation No. 168 of 1932), accrue to the Chief's deputy (to whom civil jurisdiction has been granted) who performs the services required of a Chief.

Held (4): The fees referred to in paragraphs Nos. (2) and (3)
D above are not claimable by the Chief who caused the deputy to be appointed to hear and determine civil cases unless an arrangement exists between them to the contrary.

Statutes, etc., referred to:

Rule 15 (1) Chiefs' Courts Rules (Government Notice No.
E 2885 of 9th November 1951.)

Rule 13 Chiefs' Courts Rules (Government Notice No. 2885 of 9th November, 1951.)

Section 61 (2) Natal Code of Native Law (Proclamation No. 168 of 1932).

F Appeal from the Court of the Native Commissioner, Babanango.

Ashton (Permanent Member) delivering the judgment of the Court:—

Plaintiff, a Chief of the Vryheid and Babanango Districts sued
G his chief's deputy, the defendant, in the Court of the Native Commissioner, Babanango, for the Court fees received by him in respect of the civil cases tried by the latter as laid down in the rules for Chiefs' Courts and in respect of fees paid for customary unions as laid down in the Natal Code of Native
H Law.

In response to defendant's request for further particulars of plaintiff's claim he was informed that the amounts claimed were payable to plaintiff in his capacity as Chief and when collected by defendant they should have been transmitted to the plaintiff.
I Thereafter defendant pleaded that he had received moneys in respect of customary unions and cases tried but that he was not obliged to pay them over to plaintiff; he pleaded further that he had the verbal mandate of the paramount Chief of the Zulu nation to use the money for the support of the Nobamba section
J of the Zulu Royal Kraal and that therefore plaintiff was not entitled to have the fees.

Before evidence was led at the trial the Court held that the onus was on defendant to prove the mandate of the Paramount Chief thus assuming that it was correct that a Chief's deputy
K was obliged to pay the fees in question to his Chief. Thereafter evidence was led and the Native Commissioner found that as Chief's deputy, defendant had to pay the fees mentioned to plaintiff his chief and that defendant had no mandate to use the moneys for the support of the Nobamba Kraal. He accor-
L dingly gave judgment in favour of plaintiff for the amount claimed and costs.

Against that judgment the defendant has appealed to this Court on the following grounds:—

1. That the judgment is against the evidence and contrary to law.
2. That the learned Native Commissioner erred in holding that the defendant was obliged to account to plaintiff for the amounts received by him.
3. That the amounts claimed from defendant constituted personal remuneration for services rendered. Alternatively that if such amounts be tribal funds, that the evidence establishes that defendant utilised the same in terms of the directions from the kraal of the Paramount Chief.

Defendant in his evidence admitted that where fees are received by other Chiefs' deputies they are handed over to the Chiefs who appointed them but he maintained that he deputised for the Paramount Chief (the Zulu Royal Kraal). However his letter of appointment as Chief's deputy was handed in and there can be no doubt that he was appointed as such by a predecessor of Chief Sizanempi Zulu the present plaintiff. Evidence was given by the Paramount Chief Cyprian Bekuzulu to the effect that the Nobamba Kraal was one of his Royal Kraals that rental had to be paid to the landlord of the farm on which it was and that the money to pay for it came from the fees received by defendant. This, he said, was in accordance with tradition and under cross-examination it would seem that plaintiff's father who was Chief of the tribe used to pay the rent before defendant was given civil jurisdiction. He gave further evidence indicating that the fees were to go to the landlord through the Native Commissioner but it would appear that this channel of payment was not followed.

Plaintiff gave evidence to the effect that when defendant was granted civil jurisdiction he expected him to hand the fees over to him but this expectation was not realised. He said he complained to the Chief Native Commissioner some years ago but that he got no satisfaction and eventually issued summons against defendant. He declared that he was entitled to the fees collected by his deputy and that it was his intention to reward him for his services after he had received the fees.

There is nothing in the rules or regulations or in the Code laying down definitely what the relationship is between a Chief and his deputy in so far as these fees are concerned and there was no evidence as to what a Paramount Chief's powers are.

The Native Commissioner chose to disregard the evidence of defendant and his witnesses but he overlooked the fact that the upkeep of the Nobamba Kraal was a matter which had for long been arranged to come from the representative of the Royal Kraal in the Babanango area. He accepted too readily that it is Zulu custom that the fees of office of a Chiefs' deputy have to be paid to the Chief whose deputy he is and he placed the onus of proving otherwise on the defendant.

According to the definition of "Chief" in Rule No. 15 (1) of the Chiefs' Courts Rules published under Government Notice No. 2885 of the 9th November, 1951, a Chief includes a "Chief's deputy" and the fees prescribed appear in Rule 13 as amended by Government Notice No. 1180 of 1953. There is no indication in Rule 13 that the fees are payable to anyone other than the judicial officer who hears the civil dispute and it is apparent from this Rule that the fees must primarily be paid to the Chief's deputy.

Counsel for respondent raised the argument that whatever the position might be since the promulgation of the Chiefs' Courts Regulations by Government Notice No. 2885, dated 9th November, 1951, prior to this, the old rules published under Government Notice No. 2255 of 1928, only mention fees payable to a Chief. This question was not canvassed in the Court below and we hold the view it cannot be raised for the first time in this

Court on appeal. Moreover we hold that the fees prescribed thereunder are for services rendered and if a deputy renders those services he is entitled to the fees unless the Chief who caused the deputy to be appointed to hear and determine civil cases, made an arrangement for the payment of the fees to him.

There is in the wording of section No. 61 (2) of the Natal Code of Native Law as amended much to be said for the fees being the perquisite of the Chiefs' deputy. The wording is as follows:—

> "(2) The intended husband to every customary union shall before the celebration thereof, pay a fee of 7s. 6d. to the Chief or his approved messenger and a fee of 5s. to the official witness as a remuneration for their respective services."

Surely in the case of a Chief's deputy he is the approved messenger who does the prescribed work and is entitled to be remunerated for his services and it would be for the plaintiff to prove that there was an arrangement whereby the defendant had to pay these fees to him and not to keep them for himself.

It is here necessary to refer to the action of the Native Commissioner in ruling at the outset of the hearing that the onus was upon defendant to prove that he had a mandate from the Paramount Chief to use the fees he got for the support of the Nobamba Kraal. He apparently based this decision on the premise that it was obligatory on a Chief's deputy to pay the fees of office to his Chief but it is clear that at that stage he had no evidence as to such an obligation. In fact the pleadings made it apparent that defendant denied such an obligation and it was accordingly upon the plaintiff to prove it. Once plaintiff had proved the obligation the defendant would have the burden of proving that he was an exception to the rule and it becomes necessary to ascertain whether it is in fact customary for a Chiefs' deputy to hand over to his Chief the fees he receives. As seen earlier in this judgment statutory law does not provide for the handing over so this Court called in assessors to ascertain what the position is. The questions and answers put and received form an annexure to this judgment and this Court is satisfied that there is no custom entitling a Chief to the fees of office earned by his Chief's deputy who has civil jurisdiction over a portion of his tribe but that it is usual for an arrangement to be come to between them whereby the fees are paid over to the Chief who in turn rewards the deputy for his services

Plaintiff failed to prove his right to the fees and this Court finds that the judgment of the Native Commissioner should have been in defendant's favour. This Court is the more disposed to this view because of the fact that there is weighty evidence that there was an arrangement brought about by the Paramount Chief between the plaintiff and the defendant whereby the fees were to be used by the latter for the maintenance of the Nobamba Royal Kraal.

It is accordingly ordered that the appeal be and it is hereby allowed with costs, the judgment of the Native Commissioner is set aside and for it is substituted judgment for the defendant with costs.

Opinion of Native Assessors.

Questions were put to the undermentioned assessors whose replies were recorded as follows:—

1. Chief Makehlana Dhlamini of Paulpietersburg District.
2. Chief Sikukuku Sibisi of Paulpietersburg District.
3. Chief Mohasobheni Mpungose of Mahlabatini District.
4. Chief Mhlolutini Mbata of Mahlabatini District.
5. Chief Mandhlakayise Mtetwa of Vryheid District.

Question (A): If a Chief's deputy is granted civil jurisdiction, who retains the fees?

Reply:

No. 1. The money belongs to the Chief. The Chief pays him. He allows him to draw higher *lobolo*. I pay the deputy plaintiff's fee of £1. This is my own arrangement. There is no custom.

No. 2. I have two districts—the deputy wants recompense. I say he gets nothing—all the fees come to me. He can get the fines for contempt of Court. He works for nothing. That is my own law.

No. 3. I get the fees of my deputy's cases. This is our arrangement. It is according to Zulu custom.

No. 4. I have two other areas. I retain the fees of civil cases and pay what I think to the deputy.

No. 5. I have two deputies—I pay them every three months. One at Dumbe gets £5, the one at Ngotshe, £2. I get the fees. When cattle were paid for fees the deputy collected them and handed them over to the Chief and the Chief gave back what he felt like giving.

Question (B): What is the position regarding the retention of fees paid to a Chief's deputy to arrange a customary union ceremony?

Reply:

No. 1. The fees come to me. I pay 2s. 6d. travelling fee on the Native Commissioner's instructions.

No. 2. The fees come to me. I pay 2s. 6d. travelling fees.

No. 3. The fees come to me. I pay the deputy what I think.

No. 4. The fees come to me and I pay the deputy what I think.

No. 5. I have a deputy and an official witness. I give the official witness 5s. I pay a salary to the deputy.

For appellant: Mr. C. J. Uys of Bestall & Uys.

For Respondent: Mr. W. E. White.

NORTH-EASTERN NATIVE APPEAL COURT.

NSELE *v.* MABASO.

N.A.C. CASE No. 17 OF 1956.

VRYHEID: 12th April, 1956. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

PRACTICE AND PROCEDURE.

Indulgence to one party—prejudice to other party.

Summary: Neither party to an appeal appeared for the hearing of an application to condone a late noting. Plaintiff according to a letter filed with the record of the case serving a term of twelve months imprisonment.

Held (1): That in granting an indulgence this Court must bear in mind the prejudice which the opposite party might suffer as a result.

Held (2): That in the circumstances disclosed the hearing is postponed to the next session when applicant must arrange to appear or be represented.

Appeal from the Court of the Native Commissioner, Nqutu.

A Steenkamp (President) delivering the judgment of the Court:—

When this application came before the Court neither applicant nor respondent appeared.

There was, however, attached to the record a letter from the Native Commissioner, Nqutu, indicating that applicant was under-
B going a long term of imprisonment and that he desired a post-ponement of the hearing of his application for condonation of his late noting of an appeal against the Native Commissioner's judgment.

This Court while prepared on good cause shown to meet the
C reasonable requests of litigants must bear in mind the prejudice a party might suffer as a result of an indulgence to the other party. It is not prepared to postpone the hearing until the expiration of applicant's sentence (one year I.C.L.) but in the circumstances postpones it to the next session of this Court
D namely, 3rd July, 1956, when applicant must make arrangements either to appear or be represented in this Court. As respondent was not present no costs will be awarded.

NORTH-EASTERN NATIVE APPEAL COURT.

HLONGWANE *v.* HLONGWANE.

N.A.C. CASE No. 18 OF 1956.

PIETERMARITZBURG: 25th April, 1956. Before Steenkamp, President, Ashton and Bridle, Members of the Court.

PRACTICE AND PROCEDURE.

Judgment on appeal from a Chief's Court—Rule No. 12 *of Native Chiefs' Courts—Calling of trial Chief as witness in appeal from his judgment—Delay in bringing action.*

Summary: Plaintiff claimed in a Chief's Court five head of
E cattle advanced to defendant towards his wife's *lobolo;* defendant pleaded payment; the Chief gave judgment for plaintiff as prayed and defendant appealed to the Court of the Native Commissioner, Bergville, whose judgment read "Appeal upheld with costs." That judgment was brought
F on appeal by plaintiff to this Court.

Held (1): That it is essential that when giving judgment in appeals from Chiefs' Courts Native Commissioners must state whether the Chiefs' judgments are upheld or not and, if the latter, what the judgments should be.

G *Held* (2): Section No. 12 of the Rules of Native Chiefs' Courts allow of the amendment of a defendant's plea provided the condition prescribed in Neampalala *v.* Neampalala, 1954, N.A.C. 115 (N.E.) is complied with.

Held (3): That Chiefs should not be called upon to give
H evidence in appeals from their judgments—it is highly irregular to bring such a Chief before a Native Commissioner's Court as a witness generally of the proceedings before his Court

Held (4): That a delay of twenty years in bringing an action for the return of *lobolo* is satisfactorily explained by the fact that defendant had only recently acquired stock when his daughter was *lobolaed*.

Cases referred to:

Mcampalala *v.* Mcampalala, 1954, N.A.C. 115 N.E.

Makoba *v.* Makoba, 1945, N.A.C. (T. & N.) 29.

Statutes etc., referred to:

Rule 12 Chiefs' Courts Rules (Government Notice No. 2885 of 9th November, 1951).

Appeal from Court of the Native Commissioner, Bergville.

Steenkamp (President), delivering the judgment of the Court:—

In the Chief's Court plaintiff claimed five head of cattle which he said he had advanced to defendant towards the *lobolo* for his wife and which were to be refunded although no time limit was fixed. Defendant admitted receiving the cattle from plaintiff but pleaded that plaintiff's brother had demanded payment and that he had repaid the cattle to him. The Chief gave judgment for plaintiff for five head of cattle and costs and defendant appealed to the Court of the Native Commissioner against it.

The Native Commissioner, after hearing evidence, entered judgment in these words "Appeal upheld with costs" but whether he set aside the Chief's judgment or whether he substituted another judgment for it is not apparent from the record. From the reasons for judgment he furnished when plaintiff asked for a written judgment it would seem that he was of opinion that the Chief's judgment should have been set aside and for it substituted judgment for the defendant with costs and it is on this basis that the appeal which plaintiff has made to this Court will be dealt with. It should not be necessary for this Court to point out to Native Commissioners that it is essential that when giving judgment in appeals from Chiefs' Courts they must state whether the Chief's judgment is upheld or not and if the latter what the judgment should be.

The grounds for plaintiff's appeal to this Court are:—

"1. The learned Native Commissioner erred in casting the onus of proof on the plaintiff on the pleadings on appeal from the Chief's Court.

2. The learned Native Commissioner erred in taking into consideration the defence evidence that defendant had not borrowed the cattle from plaintiff, the sole issue on appeal before him being whether defendant had returned the cattle to plaintiff's deceased brother and whether the latter had authority to receive such cattle on behalf of plaintiff.

3. The judgment is against the weight of evidence."

Plaintiff was called upon to commence in the Native Commissioner's Court after argument and the ruling of the Native Commissioner in this regard is challenged by plaintiff. When a case comes on appeal from a Chief's Court to a Native Commissioner's Court it is started *de novo;* at the hearing it was intimated by the attorney for defendant that the defence put up in the Chief's Court was being amended; such a course is allowed by section 12 of the Rules for Native Chiefs' Courts in civil matters provided the condition prescribed in Ncampalala *v.* Ncampalala, 1954, N.A.C. 115 (N.E.) is complied with. This condition appears to have been completely overlooked by the Native Commissioner but as will appear later the fact that he placed the onus on plaintiff does not affect the judgment which this Court arrives at.

The evidence given by plaintiff and his one witness was to the effect that plaintiff lent defendant five head of cattle valued at £41 and that the cattle were his own property and had nothing to do with plaintiff's brother Steinie who had died in 1954.

Defendant said in evidence that he borrowed four head from his uncle Steinie and that he paid one back to him at home leaving a debt of three which he settled by paying £14 to Steinie at Alexandra Township. He named three witnesses to this payment. One of them Bunywana Hlongwana gave evidence corroborating defendant. Another Dano Hlongwane also gave corroborative evidence.

Defendant called Dasida Hlongwane who testified to the effect that defendant borrowed four cattle from Steinie but was at first at a loss to say where defendant got the other six which he said he paid as *lobolo*. However, he then said that defendant bought them but he went on to say that plaintiff did claim cattle from defendant even in Steinie's lifetime.

Then after some argument the Chief, who tried the case, was called and he said that in his Court defendant had admitted obtaining the cattle from plaintiff and pleaded that he had paid them to Steinie in Johannesburg. He qualified this in cross-examination by saying that defendant admitted getting the cattle from the Hlongwane kraal and that Steinie was the kraalhead but was away and that plaintiff was the man who handed over the cattle not on behalf of the kraalhead but out of his own herd. Thereafter, in answer to the Court the Chief said "I was satisfied from the evidence that plaintiff handed the cattle over in his private capacity and not as representative of the Hlongwane Kraal."

It has previously been ruled by this Court that Chiefs should not be called upon to give evidence in appeals from their judgments and the Native Commissioner is referred to the case of Makoba *v.* Makoba 1945 N.A.C. (T. and N.) 29, where it was held:—

> "While it is not irregular to call a Chief as a witness in special circumstances, where e.g. it is contended that one of the witnesses made a contrary statement to that made in the Native Commissioner's Court, it is highly irregular to bring him before the Native Commissioner's Court as a witness generally of the proceedings before his Court . . . . The Court prefers that this practice be discontinued."

It was irregular for the Chief in this case to have been asked his opinion concerning the evidence led before him and the Native Commissioner misdirected himself when he remarked in his reasons for judgment that he wondered why plaintiff did not call the Chief to testify on his behalf.

The Native Commissioner did not indicate whether the witnesses before him gave their evidence satisfactorily or not but gave judgment on the probabilities of the case after discussing the onus and the delay plaintiff took in bringing the action.

Respondent's Counsel strenuously argued that the delay on the part of the plaintiff in bringing this action, namely twenty years, has prejudiced the respondent in his defence. The plaintiff has given a satisfactory explanation for the delay, namely, that the respondent had not until recently, when he obtained *lobolo* for his daughter, owned any stock and defendant has been unable to show any real prejudice. This Court is therefore entitled to decide on the record whether defendant and his witnesses gave a good answer to the claim as narrated by plaintiff and his one witness. And this Court has no hesitation in deciding that the Native Commissioner was wrong in believing defendant and his witnesses and that he should have found for plaintiff.

The appeal is accordingly allowed with costs. The Native Commissioner's judgment is set aside and for it is substituted "The appeal is dismissed with costs. The Chief's judgment is upheld but the words 'or their value £41' are inserted after the word 'cattle' in his recorded judgment."

For Appellant: Adv J. B. Talbot (instructed by Hellett & De Waal).

For Respondent: Adv. J. H. Niehaus (instructed by Macaulay & Riddell).

NORTH-EASTERN NATIVE APPEAL COURT.

MYENI *v.* MYENI.

N.A.C. CASE No. 73 OF 1955.

ESHOWE: 1st May, 1956. Before Steenkamp, President, Ashton and Oftebro, Members of the Court.

ZULU CUSTOM.

Summary: Plaintiff sued defendant in a Chief's Court for forty-nine head of cattle which he stated were loaned for *lobolo* purposes by his grandfather whose heir he is to defendant's father and uncles whose heir defendant is. The unions for which eighteen head of cattle were advanced as *lobolo* took A
place and those in respect of which thirty one head were paid did not take place and were refundable by the recipients. The Chief gave judgment for defendant but plaintiff appealed to the Native Commissioner who reversed the judgment. Appeal was then brought to this Court but the case was sent B
back with directions to call for the Chief's reasons for judgment and to give a fresh judgment. The Native Commissioner complied with the directions and then gave judgment for defendant. This judgment was then brought on appeal by the plaintiff to this Court. C

Held: (1) That the ownership of cattle paid by a father as the *lobolo* for his son does not pass to the son and then to the father of the girl *lobola'd*. Ownership passes only when the union takes place.

Held: (2) That if the contemplaed union does not take place the D
cattle are regarded in so far as ownership is concerned as though they were *sisa'd* and if they are returnable they must be recovered by the son's father.

Held: (3) That the plaintiff was entitled to recover from defendant the eighteen head of cattle in respect of which the E
unions took place but that in regard to the balance which was returnable because no union took place the plaintiff must sue the persons to whom they were paid.

Cases referred to:

Magwaza v. Magwaza, 1937, N.A.C. (N. & T.), 3. F

Bhulose v. Ndimande, 1926, N.H.C., 23.
(Also 1938 (T. & N.), 101, N.A.C. (N. E.), 308.

Nzimela v. Mkwanazi, 1941, N.A.C. (N. & T.), 12.

Appeal from the Court of the Native Commisioner, Ubombo.

Ashton (Permanent Member) delivering the judgment of the G
Court:—

This case originated in the Chief's Court when plaintiff, Magwaza Myeni, sued defendant, Mpini Myeni, for forty nine head of cattle which he stated were advanced by his grandfather to defendant's father and uncles for *lobolo* purposes. Plaintiff H
is heir on the one side and defendant is heir on the other side.

The Chief gave judgment for Mpini Myeni with costs and Magwaza Myeni appealed against the decision to the Native Commissioner. That officer upheld the appeal and gave judgment for Magwaza Myeni for forty nine head of cattle and costs. I

Against that judgment Mpini Myeni appealed to this Court which set aside the judgment of the Native Commissioner and ordered that the Chief's reasons for judgment be called for by the Native Commissioner who was to take them into account and give a fresh judgment (see case Myeni *v.* Myeni, 1955, N.A.C. 79 J
(N.E.).

This Court drew the Native Commissioner's attention to the fact that he had held certain unions to have taken place against the evidence led before him and he was directed to accept as a fact that the unions had not taken place.

A Thereafter the Native Commissioner gave a fresh judgment in which he upheld the Chief's original judgment viz. for Mpini Myeni (the defendant).

Against this lastmentioned judgment Magwaza Myeni (the plaintiff) has appealed to this Court after having called for and B obtained a written judgment from the Native Commissioner in teerms of section 2 (1) of the rules of this Court. This judgment reads as follows:—

> "The proceedings in this case prior to the fresh judgment given on the 30th September, 1955, clearly indicate the C position. Having been directed by the Native Appeal Court to hold that no customary unions had taken place, this Court could do no other than uphold the Chief's judgment because in that event, defendant is illegimate and cannot be held responsible for the debts of his father and uncles. The D plaintiff must accordingly claim the cattle from the fathers (or their heirs) of the respective girls as he is the heir not only to his grandfather but to all the latter's sons and defendant has no standing in this matter. This Court is still of the opinion that the unions of at least Njobonda's first E wife and defendant's mother were proved as no evidence to the contrary was led and that plaintiff should succeed in his claim for eighteen head of cattle but it is bound by the directions of the Native Appeal Court and consequently found for defendant."

F The appeal now lodged by Magwaza Myeni, the plaintiff, is in the following terms:—

> "Please take notice that the above-named plaintiff hereby notes an Appeal against the whole judgment delivered in the above Honourable Court in this case on 30th September, G 1955, (*vide* written judgment dated 8th October, 1955), on the following grounds:—
>
> *On Points of Fact.*
>
> 1. That the Native Appeal Court, in its judgment dated 20th July, 1955, directing that the learned Native H Commissioner, in reconsidering the case, should accept as a fact that "these unions did not take place", had in mind and was referring to the women for and in respect of whom plaintiff's grandfather paid *lobola* on behalf of defendant's uncle, Nyobondo, and defendant's I father, Madovu, with the exception of Nyobondo's first wife and Madovu's first wife (the mother of defendant).
>
> 2. That it was accepted by the parties that Madovu was legally married to defendant's mother.
>
> J *On Points of Law.*
>
> 3. That by reason of the fact that defendant's father and mother were legally married, the learned Native Commissioner erred in holding that defendant was illegitimate.
>
> K 4. That in the premises defendant, as heir of both Nyobondo and Madovu, was and still is liable for their debts.
>
> 5. That the cattle advanced by the plaintiff's grandfather for the purposes set out in paragraph 1 above, on L behalf of Nyobondo and Madovu, both in respect of the women they legally married and also of those to whom they were not married, were loans repayable by law, by the persons to whom the loans were made.
>
> 6. That defendant is accordingly liable to plaintiff for the M cattle claimed."

Thereafter in his reasons for judgment the Native Commissioner makes it clear that he misread this Court's directions regarding the customary unions referred to in the fourth paragraph above and points out that defendant is obliged in law to refund eighteen head of cattle advanced in respect of the two unions which did take place but that in regard to the cattle in respect of those unions which did not take place plaintiff must look to the fathers of the girls who were *lobola'd* but did not marry. A

The position regarding the eighteen head of cattle is unassailable and the law regarding the refund of the *lobolo* in respect of the unions which did not take place is correctly stated as being that Plaintiff must sue the person to whom they were paid. It is fitting here to state that the ownership of cattle paid by a father as the *lobolo* for his son does not pass to the son and then to the father of the girl *lobola'd*. Ownership passes only when the union takes place. B C

If the contemplated union does not take place the cattle are regarded in so far as ownership is concerned as though they were *sisa'd* and if they are returnable they must be recovered by the son's father. This is established Zulu custom and is applicable in respect of the balance of the cattle (namely thirty-one) for which plaintiff owed defendant in this case on appeal. D

In making this statement this Court is following previous decisions on the subject and what it believes is true Native Law in the province Natal. The previous decisions are Magwaza *v.* Magwaza, 1937, N.A.C. (N. & T.), 3 and Bhulose *v.* Ndimande, 1926, N.H.C., 23 [see also 1938 (T. & N.), 101, 1 N.A.C. (N.E.), 308]. E

In the case of *Mzimela v. Mkwanazi*, 1941, N.A.C. (N. & T.), 12, the father of an intending bridegroom paid cattle for him to his intended bride's father and before the union took place, the *lobolo* cattle increased. When the union took place the father, not the son, was held to be entitled to claim back the excess *lobolo* paid as they were still his father's property. The point is quite clear and for the purposes of this case this Court need go no further but when it becomes a question (in a case where the cattle have to be repaid by the son to the father) as to whether the son repays the actual number advanced by his father or that number plus or minus the increase or loss as the case may be this Court offers no opinion. It is dealing only with the relationship between the respective fathers of the intended bridegroom and bride. F G H

It follows that the balance of the cattle namely thirty-one must be claimed by the plaintiff from the persons to whom they were paid. I

In the result the Chief's judgment should have been for plaintiff for eighteen head of cattle and costs with absolution in respect of the balance of thirty-one head.

The appeal is accordingly allowed with costs. The Native Commissioner's judgment is set aside and for it is substituted "The appeal is allowed with costs; the Chief's judgment is set aside and for it is substituted 'For plaintiff for eighteen head of cattle and costs and in respect of the balance of thirty-one head absolution from the instance with costs.'" J

For Appellant: Mr. W. E. White, instructed by J. Gerson K

For Respondent: Mr. S. H. Brien, of Wynne & Wynne, instructed by S. E. Henwood & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

MTIYANE *v.* GUMEDE.

N.A.C. CASE No. 6 OF 1956.

ESHOWE: 2nd May, 1956. Before Steenkamp, President, Ashton and Alfers, Members of the Court.

PRACTICE AND PROCEDURE AND EVIDENCE.

Summary: Plaintiff in this case was the claimant of two animals which had been attached by a Chief's messenger in pursuance of a judgment of the Chief in which defendant in this case was the judgment creditor. The animals were handed to the judgment creditor and they were in his possession when the action was instituted. The Native Commissioner gave a judgment and declared the animals not executable whereupon defendant appealed but no appearance for him was made on the day set down for the hearing and his appeal was deemed to have lapsed. A fresh appeal was noted and condonation for its late noting was asked for. This was granted.

Held: (1) Once an appeal has lapsed it cannot be revived or restored on the Roll. The only remedy is to note a fresh appeal and apply for condonation of its late noting.

Held: (2) There is no provision in the Rules of Native Chief's Courts for interpleader actions but there is a remedy for a wrongful attachment.

Held: (3) If a Native Commissioner desires to afford written assistance to the Messenger of a Native Chief's Court in the execution of a judgment of such a Court the document he issues must be what it purports to be—i.e. only a letter of introduction.

Held: (4) Native women may normally not be concerned with cattle and may be unreliable in respect of the description or identification of cattle but while that may be good reason for weighing their evidence carefully it is no justification for disregarding their evidence on such matters entirely.

Cases referred to:

Hlatshwayo v. Hlongwane, 1, N.A. C. (N.E.), 201.

Msabala v. Nyati, 1955, N.A.C. (N.E.), 131.

Statutes, etc., referred to:

Section 15 of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Empangeni.

Ashton (Permanent Member) delivering the judgment of the Court.

The appellant noted an appeal against the judgment of the Native Commissioner, Empangeni. The hearing of the appeal was set down for the 25th of January, 1956, but as the appellant was not present, nor his legal representative to prosecute the appeal it was ordered by the Court that the appeal be deemed to have lapsed.

Appellant has now noted a fresh appeal. The notice of appeal is dated the 8th February, 1956, i.e. a considerable period after the 24th October, 1955, being the date the judgment was given by the Native Commissioner. The appellant has also filed an affidavit headed "Application for Condonation". This consists of ten paragraphs which are relevant in the application for the condonation of the late noting of the present notice of appeal

but unfortunately the appellant in the prayer petitions this Court to condone his failure to appear on 25h January, 1956, at Eshowe and asks for the appeal to be restored or allow it to be replaced on the Roll.

Once an appeal has lapsed it cannot be revived or restored on the Roll and what appellant should have applied for is for the condonation of the late noting of the present notice of appeal.

The application is dealt with on these terms and there being much to be said for the failure of appellant to appear at the time and place fixed for the hearing and there being a possibility that the appellant might succeed in his appeal the late noting of the appeal is condoned and argument is allowed.

At the outset the manner in which the case was brought before the Native Commissioner's Court calls for criticism. The claim is based on a judgment in a Chief's Court and is in the nature of an interpleader. But as has frequently been pointed out by this Court there is no provision in the rules of Native Chiefs' Courts for interpleader actions. The case of *Hlatshwayo v. Hlongwane*, 1, N.A.C. (N. E.), 201, gives guidance to litigants and courts as to the procedure to be adopted in such matters and a more recent case Msabala v. Nyati, 1955, N.A.C. (N.E.), 131 eloborates the position.

Instead of the ordinary form of summons being used by the claimant of the animals which were the subject of dispute the claimant used the ordinary form (N.A. 140) applicable to an interpleader summons but he modified it by adding a statement explaining his claim which is in the nature of a "particulars of claim" in an ordinary summons. It is important to note that the attached cattle are in the possession of the judgment creditor defendant.

In the circumstances this Court has dealt with the case as one in which plaintiff (claimant) has instituted a vindicatory claim against defendant (judgment creditor), in whose possession the attached cattle are because the hearing of the claim by the Native Commissioner did not depart from the ordinary rules which would have applied if the proper procedure had been adopted and because neither party will suffer any prejudice. If any authority for such action is required of this Court the provisions of section *fifteen* of Act No. 38 of 1927 are ample reply.

To proceed now with the appeal.

This action came as an interpleader in the Court of the Native Commissioner, Empangeni, in connection with the attachment of one white cow and one young red and white spotted bull.

The cattle were attached by virtue of what is described as a warrant of execution issued by the Court of the Native Commissioner but which in fact is nothing of the sort being a letter addressed to the Stock Inspector, Empangeni, saying that a judgment was given by Chief Kasazi Mtiyane and that tribal constable Mfuneni Dube had been authorised to attach one beast in satisfaction of the judgment. The issue of such a document is without legal sanction and it should not be headed "Warrant of Execution" as was done in this case. If assistance in making an attachment is to be given to the Messenger ot a Chief's Court then the document must be what it purports to be—an administrative letter of introduction to the officer in charge at a dipping tank indicating that the bearer is carrying out the duly registered judgment of a Chief.

Although the attachment is described in the summons as having been effected by virtue of an invalid document it is clear that the Messenger of the Chief's Court had the right to attach and the invalidity of the document would not of itself invalidate the attachment and provided the attachment was effected in accordance with the recognised laws and customs of the tribe all was in order.

The cattle were attached in claimant's possession in his absence and they were pointed out to the messenger by the judgment

creditor as being the judgment debtor's property. The judgment creditor was called upon to lead the evidence, the Native Commissioner having rightly held that the onus was upon him to prove that the cattle were the property of the judgment debtor.

Judgment creditor said in evidence that he had the animals attached because judgment debtor had pointed out the cow as part of the *lobolo* due by him for his daughter Mbibi and had told him the animals were running at claimant's kraal. It must here be explained that the second beast is the calf of the cow which is described as being white. In answers to questions put to him by claimant the judgment creditor said that he went to his kraal and told him the colours of the cattle which judgment debtor had pointed out and claimant did not deny the truth of what he told him. He said that the description of the cattle was actually written down and shown to claimant in the presence of judgment debtor and again claimant did not say that judgment debtor had no cattle at his kraal.

There followed evidence by two of judgment creditor's daughters which confirmed his testimony but the Native Commissioner disregarded their evidence apparently because "Native woman are not normally concerned with cattle and are very unreliable in respect of either the description or identification of cattle". But while those might be good reasons for weighing carefully the evidence of the two girls they are no justification for disregarding their evidence entirely especially as what they said corroborated a witness—judgment creditor—about whose evidence the Native Commissioner had nothing adverse to say in his reasons for judgment.

Claimant called the judgment debtor who declared that the attached cow belonged to claimant but he admitted that the animals he had mentioned as his were at one time at claimant's kraal because, he said, he had no herd boy of his own. He denied, however, that one of them was the white cow which had been attached. He admitted that he had the cattle in his kraal when judgment creditor's daughter saw them but he denied that he ever had a white cow. The Native Commissioner does not criticise the credibility of this witness but from the record this Court does not consider him reliable.

Claimant then gave evidence himself and he claimed that the white cow was his but he did not say how he acquired it though it is on record in his statement of claim that the animals are the progeny of the cow he bought from his brother who knows them very well and who is a neighbour of his. It is significant that he did not call his brother but rested on his own evidence and that of this brother-in-law the judgment debtor.

Although this case depends upon findings of fact this Court is satisfied that the Native Commissioner came to a wrong conclusion namely that the judgment creditor did not prove that the animals belonged to the judgment debtor. It follows therefore that on the way he took the case the Native Commissioner's judgment should have been that the cattle were executable.

However, bearing in mind what was said at the outset in this case claimant or plaintiff simply loses the case in favour of judgment creditor or defendant.

It is ordered therefore that the appeal be and it is hereby allowed with costs. The judgment of the Native Commissioner is set aside and for it is substituted "Judgment for defendant (called judgment creditor) with costs".

For Appellant: Mr. W. E. White, instructed by W. T. Clark.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

DUBE *v.* KAMBULE.

N.A.C. CASE No. 63 OF 1955.

DURBAN: 9th May, 1956. Before Steenkamp, President, Ashton and Gillbanks, Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction: Grounds of Appeal. Costs.

Summary: Plaintiff the registered owner of landed property sought an order of ejectment from the land against defendant who contended that he was a bona fide possessor of the land and having effected imrovements he was entitled to remain in possession until he had been compensated in the sum of £600. The Native Commissioner held that in view of the sum involved he had no jurisdiction and he gave judgment for defendant. Plaintiff appealed on the ground "that the judgment is against the weight of evidence and evidence" and sought to amend the grounds of appeal.

Held: That in terms of section *ten* (1) of Act No. 38 of 1927 there is no limit in regard to value in civil causes and matters between Native and Native in Native Commissioners' Courts even if the presiding officer of such a Court also holds the rank of Magistrate and would in Magistrates' Courts be precluded from trying such actions.

Held further: That an appeal is not invalid by reason of the only ground for its noting being "that the judgment is against the weight of evidence and evidence".

Held further: That where plaintiff and defendant are equally blameable for unnecessary litigation no order as to costs should be made but where a party has to come to Court to have a palpably wrong judgment set aside on appeal he will be entitled to costs if the appeal succeeds.

Cases referred to:

Rex v. Nicholson, 1949, (2), S.A. 585, (N.).

Merber v. Merber, 1948, (1), S.A. 446, (A.D.).

Statutes, etc. referred to:

Section *ten* (1) Act 38 of 1927.

Appeal from the Court of the Native Commissioner, Stanger.

Steenkamp (President) delivering the judgment of the Court:—

Plaintiff claims to be the registered owner of Lot 5, Block M, of Charlottedale, in extent 15 acres 1 rood 17 perches which he holds under a Deed of Transfer, dated 3rd August, 1953. He obtained his title from Dinga Mbambo under two agreements of sale—one dated the 15th February, 1947, in respect of approximately five acres and the other dated the 20th June, 1947, in respect of approximately ten acres.

In each of these agreements appears a clause reading as follows:—

"4. The purchaser is aware that the land purchased is portion of the land let by the seller to Malcolm Kambule ka Hamilton Kambule under an agreement of lease for nineteen (19) years three hundred and sixty four (364) days from the 15th day of March, 1942, with a right of renewal for a similar period."

Plaintiff averred that he gave defendant three months notice on the 25th September, 1953, to vacate the land and because he failed to vacate he asks for an order of ejectment, rent from the 1st October, 1953, to the 31st January, 1954, amounting to £3. 15s. at the rate of £15 per annum and £25 damages at the rate of £15 per annum for the period from the 1st February, 1954, to the date of ejectment.

Defendant's reply to the summons was that he was a bona fide possessor of the land and having effected improvements thereto he was entitled to remain in possession of the land until he had been suitably compensated in the sum of £600. He denied liability for rent and pleaded that as the substance of the case was an amount of £600 the Native Commissioner's Court had no jurisdiction to hear the whole case. The plea regarding the jurisdiction is an indication of the attorney's lack of essential knowledge of the law relating to Native Commissioners' Courts and it comes as a shock to this Court to read that the Native Commissioner upheld it. It is not necessary to do more than refer to section *ten* (1) of Act No. 38 of 1927 where it will be seen that in regard to value there is no limit in civil causes and matters between Native and Native in Native Commissioners' Courts and it should be pointed out that even if the presiding officer in such Courts also holds the rank of magistrate he is not limited to actions in a Native Commissioners' Court which in the Magistrate's Court he would be precluded from trying.

The Native Commissioner found that defendant was a bona fide possessor and held that such being the case plaintiff could not eject him from the land until he had paid him compensation for such improvements as defendant had effected on the land. He held that the present value of the improvements amounted to £675 and that as that amount is beyond the jurisdiction of the Court defendant was entitled to judgment in his favour with costs.

Now the value of the improvements was given by the sworn valuator, who testified, as £675 but of that amount £515 was for reapable cane while only £158 was for cane roots and £5 for banana plants. The sworn valuator said he could find no reclamation improvements and he being the defendant's expert witness the Court would necessarily accept his evidence in the absence of exceptional circumstances.

It seems therefore that the Native Commissioner could easily have given a definite judgment on the evidence before him and should have done so. There is no doubt that the defendant must be regarded as a bona fide possessor and there is no doubt that the property's value was to some extent enhanced.

At the outset of the hearing of this appeal counsel for appellant asked leave for the formal amendment of the grounds of appeal in terms of an application which had been duly filed and served on the respondent. Counsel for the latter contended that the appeal itself was not in order and so not valid because the only ground for appeal was "that the judgement is against the weight of evidence and evidence" but there is ample authority [see those cited in Rex *v.* Nicholson, 1949, (2), S.A. 585, (N.)] for accepting an appeal so worded and the Court accordingly granted leave for the amendment sought which in fact is nothing more than amplification of the ground originally noted.

On appeal the counsel for the parties were able at the Court's request to reach an equitable settlement of the case in so far as the points at issue were involved but on the question of costs they were unable to agree and both were heard in argument.

Counsel for appellant strongly argued that costs in both Courts should be awarded to the plaintiff. He stressed that if defendant when he received the notice to vacate the property had raised a claim for improvement effected during the time he was a bona fide occupier, there might not have been any need for litigation. On the other hand counsel for respondent argued

that in giving notice to defendant, the plaintiff should have made an offer to compensate the defendant for the improvements effected.

It is difficult for this Court to surmise what plaintiff's reaction would have been if defendant had at that stage made a claim for improvements but to judge by the particulars of claim the evidence adduced and the argument advanced in the Court below it seemed to be plaintiff's attitude all along that defendant was not a bona fide occupier and could not have been eager at any stage to effect a compromise.

In the case of Merber *v.* Merber, 1948, (1), S.A. 446, (A.D.) is was held that a Court is entitled to deprive a successful party of his costs if (1) he has brought about the litigation or (2) he has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense.

There is nothing in the pleading or evidence adduced on behalf of the defendant that he would have been amenable to any compromise and the impression this Court has is that he wanted to be compensated for the value of the standing crop of sugar cane without making any allowance for the cost of cutting and incidental charges, pertaining thereto if he had to market the cane.

In exercising our discretion we come to the conclusion that both parties are equally blameable for the litigation and justice will be done if no order as to costs in the Court below is made.

The position is somewhat different in this Court to which plaintiff had to come to have a palpably wrong judgment set aside. The judgment of the Native Commissioner as it stood would have deprived the plaintiff for all time of any right to the occupation of ground for which he holds title. Plaintiff must therefore be awarded the costs of the appeal.

It is ordered that the appeal be and it is hereby allowed with costs and the Native Commissioner's judgment is altered by consent to the following:—

(1) That the defendant, his household and all persons claiming any right through or under him shall vacate a certain piece of land being Lot No. 5 Block M of the farm Charlottedale No. 2723 situate in the county of Victoria, Province of Natal, in extent 15 acres 1 rood 17 perches held under Deed of Transfer No. 5930/1953, dated 3rd of August, 1953.

(2) That the warrant of Execution on this judgment shall not be issued before the 1st September, 1956.

(3) That the defendant shall be permitted to cut all standing cane on the property until and including the 31st of August, 1956, for his own benefit.

(4) That the roots of such cane shall be left intact.

(5) That all cane still standing on the land on 1st September, 1956, shall be the property of the plaintiff.

It is also ordered that each party shall bear his own costs in the Native Commissioner's Court.

For Appellant: Adv. R. G. L. Hourquebie, instructed by Cowley and Cowley.

For Respondent: Adv. A. H. Humphrey, instructed by N. R. F. Stevens.

NORTH-EASTERN NATIVE APPEAL COURT.

NZIMANDE *v.* MCAKUMBANA.

N.A.C. CASE No. 91 OF 1955.

DURBAN: 9th May, 1956. Before Steenkamp, President, Ashton and Gillbanks, Members of the Court.

LAW OF DELICT.

Defamation: damages.

Summary: Plaintiff sued defendant for £300 damages for defamation. The Court below awarded a sum of £100. The defamatory matter was contained in a privileged report which defendant allowed to lie about and come to be read by members of his staff.

Held: (1) That it must be taken into account the amount of publication there was and it would seem that it was only plaintiff's immediate co-workers who read the report.

Held: (2) That while defendant's carelessness was reprehensible the damage suffered by defendant was nowhere near what he claimed nor what he was awarded.

Held: (3) That in all the circumstances the damages should be reduced to £10.

Cases referred to:

Tothill v. Foster, 1925, T.P.D., 857.

Appeal from the Court of the Native Commissioner, Durban.

Ashton (Permanent Member), delivering the judgment of the Court:—

Plaintiff sued defendant in the Court of the Native Commissioner, Durban, for the sum of £300 being damages for defamation. The declaration stated that defendant wrote a letter to the District Inspector of Schools containing words defamatory of plaintiff and left a copy of it in a notebook which was available to members of the school staff to which they both belonged and went on to aver that the contents of the letter were seen by certain named members of the staff.

Defendant admitted writing the letter in his capacity as Headmaster of the school to his District Inspector but declared the words complained of were true and privileged. He also admitted that a copy of the letter formed part of a book used by certain members of the staff in the course of their duties but he denied that plaintiff suffered any damages by reason of his actions.

After considerable evidence was heard the Additional Native Commissioner found that defendant had written the words complained of and that they were defamatory of plaintiff but they were used on a privileged occasion. He held further that publication to several members of the school staff occurred and that such publication was due to the neglect of defendant. He thereupon awarded plaintiff £100 and costs.

Against this judgment appeal has been noted on the following grounds:—

"(*a*) The Additional Native Commissioner erred in finding that there was any publication of the defamatory words by defendant;
Alternatively:

If there was publication the Additional Native Commissioner erred in holding that such publication was caused by negligence on the part of defendant.

(*b*) The amount awarded as damages exceeded the damages found to have been suffered by plaintiff."

There can be no doubt that publication of the letter which was accepted as having been written on a privileged occasion did take place and that the defendant is liable for publication of the defamatory matter to a third person unless he can show that it was not due to any want of care on his part. A

In this connection the words of Curlewis J. P. in the case of Tothill *v.* Foster, 1925, T.P.D., 857 at 863 are very much in point. In that case defendant in handing in certain medical reports, which were privileged, to a girl to pass on to the lodge official for whom they were meant wrote on the outside of one B envelope certain defamatory words. The learned judge said [quoting Nathan on the Law of Defamation (Libel and Slander) in South Africa at page 99]:—

> "I am prepared to accept the conclusion which the evidence seems to me to justify that the defendant had no C personal feeling against Foster and that there was no malice on his part; that in writing those words on the envelope he acted without realising what the effect would be in handing the envelope, with the words thereon, to the girl . . . . but that his action, in doing what he did, was . . . . grossly negligent. D It is quite clear that there was no intention on his part to injure the plaintiff in any way. What he did was the result of gross negligence and the result of not realising that, in doing what he did, he might be causing some injury because the girl . . . . might see and read these words and he might E thereby be publishing a defamatory statement about Foster."

At the same time the Court went on to explain "that the absence of personal feeling and the fact that the publication, F though grossly negligent, was unintentional operated to reduce damages and the learned author adds that each case must depend on its own facts and the real ground of mitigation of damages in Tothill v. Foster was that the publication was extremely limited in extent and that thus no great harm was done.

It is clear from his evidence in chief that defendant had had G an uphill fight to improve the standard of the school of which he was the Principal and that plaintiff and his friend Pewa who were Xosas were giving him trouble. It is clear that in submitting his report on plaintiff he was actuated by motives of H duty although there was evidence of some ill feeling between them but there was no evidence that defendant acted with any *animus injuriandi* when he left the copy of the letter in the book which other members of his staff used and had access to. His action was careless if not actually negligent and it must accordingly be taken to have "upset" the privileged occasion on which I defendant relied for his defence.

As to whether the circumstances were such that they might reduce the amount of damages defendant might rightly be called upon to pay it is necessary to look to the further evidence given by defendant. J

He admitted that the letter might be read if the book were used by persons other than himself but he denied carelessness and would not admit that he owed plaintiff an apolgy. He justified the report he made of plaintiff but in cross-examination blackguarded him in no uncertain terms to wit:— K

> "He (plaintiff) is a man who would behave like a hooligan without restraint. He has done so. He is almost a 'Tsotsi'. A 'Tsotsi' is almost a criminal and he is almost a criminal."

It must be taken into account the amount of publication there was and it would seem that it was only plaintiff's immediate L co-workers who read the report.

It is considered that while defendant's carelessness was reprehensible and his actions subsequent to the issue of summons were hardly what could be expected of a man who had accidentally done a colleague a wrong the actual damage suffered by plaintiff M

was nowhere near that which he claimed nor what he was awarded. He apparently deserved what was said of him and it is thought that a sum of £10 would be more fitting in all the circumstances of the case.

A The appellant having succeeded in a substantial reduction of the amount of damages awarded by the Native Commissioner, he is entitled to costs of appeal.

It is ordered therefore that the appeal be and it is hereby allowed in part with costs. The judgment of the Additional B Native Commissioner is set aside and for it is substituted judgment for plaintiff for £10 and costs.

For Appellant: Adv. M. L. Mitchell, instructed by Deputy State Attorney.

For Respondent: Adv. J. Gurwitz, instructed by H. N. Basner.

NORTH-EASTERN NATIVE APPEAL COURT.

MASIMULA *v.* MBHELE.

N.A.C. CASE No. 4 OF 1956.

DURBAN: 9th May, 1956. Before Steenkamp, President, Ashton and Gillbanks, Members of the Court.

LAW OF DELICT.

Damages for seduction and consequent pregnancy—corroboration of complainant when misconduct denied by defendant.

Summary: Plaintiff sued defendant for damages for the seduction of his daughter by defendant, the daughter having given C birth to a child whose father she said was defendant. Defendant denied the seduction on oath and the question was whether there was corroboration of the girl's story.

Held: Following the judgment in Jagadamba v. Boya, 1947, (2), S.A., 283 (N.).

D That while it is quite true that the evidence of the girl was beyond reproach, it was denied on oath by the defendant and the plaintiff cannot win if there is no corroboration of her evidence.

Held further: Following the judgment in Wiehman v. Simon, E N.O., 1938, A.D. 447 at page 450 that "By corroboration in seduction cases is meant some evidence, apart from the testimony of the woman which is in some degree consistent with her story and inconsistent with the story of the man."

Cases referred to: ...

F Jagadamba v. Boya, 1947, (2), S.A. 283 N.
Wiehman v. Simon, N.O., 1938, A.D., 447.

Appeal from the Court of the Native Commissioner, Port Shepstone.

Steenkamp (President), delivering the judgment of the Court:—

G In the Court of the Native Commissioner, Port Shepstone, plaintiff sued defendant for "£5 damages for *Ingqutu* beast; £5 damages for *Imvala* beast; £45 tuition fees from 1946 to 1954", it being his contention that defendant was liable to him in the sums stated because he had made his (plaintiff's) daughter H pregnant while she was attending the school of which defendant was the Principal. No evidence was led regarding the £45 tuition fees and the case was dealt with purely as a claim for damages for seduction and subsequent pregnancy.

After hearing voluminous evidence the Native Commissioner gave judgment as follows:—

"For plaintiff for two beasts or their cash equivalent £10 and costs."

and against that judgment defendant appeals to this Court in these terms:— A

"(*a*) The whole of the judgment is appealed against.

(*b*) The grounds of the appeal are as follows:—

That the judgment is against the weight of evidence and is wrong in law." B

How it is wrong in law is not stated and the appeal must be considered solely on the ground that the judgment is against the weight of evidence.

It is abundantly clear from the evidence that the probabilities are in plaintiff's favour but in a seduction case when the C defendant denies the seduction on oath the plaintiff can win only if the complainant's evidence in regard to the seduction is corroborated. It is just as clear from the evidence that the seduction took place clandestinely and the necessary corroboration has to be sought from the girl's family and friends as to D admissions made by the defendant.

The Native Commissioner in thirteen pages of "reasons for judgment" of which six are devoted to (as he puts it) "narrating the history of the case in brief" has this to say regarding corroboration:— E

"Admittedly the onus is on the plaintiff and that in addition to credibility of the girl there must be some corroboration of her testimony, but as properly pointed out by plaintiff's attorney the sequence of events as set forth by Lephina synchronise so beautifully and is so well com- F plemented by collateral occurrences that no reasonable man could possibly doubt her veracity and the reliability of her evidence."

and later:

"As submitted by defendant's attorney, it is a matter of G credibility and whether there is corroboration and sufficient corroboration of the girl's testimony."

It is quite true that the evidence of the girl was beyond reproach but as it was denied on oath by the defendant the plaintiff cannot win if there is no corroboration. This was distinctly and H succinctly laid down in the case of Jagadamba *v.* Boya, 1947, (2), S.A. 283 (N). As to what is meant by corroboration it was laid down in Wiehman *v.* Simon, N.O., 1938, A.D. 447 at page 450 that "By corroboration in seduction cases is meant some evidence, apart from the testimony of the woman, which is in I some degree consistent with her story and inconsistent with the story of the man." The "synchrony of the sequence of events" however "beautiful" it may be hardly fits in with this dictum.

But if the Native Commissioner failed to indicate what corroboration there actually was this Court can remedy the J omission and will do so.

The evidence of plaintiff and his witnesses clearly proved that when the charge was made against defendant he admitted responsibility and agreed to pay damages. Whether or not that admission was in fact not intended to be real but merely to avoid K publicity and the resultant loss of his appointment as a teacher may be arguable. But there can be no doubt that defendant denied that he made any such admission or agreement and declared that at all the interviews which took place regarding his responsibility he denied that he had had intercourse with the L daughter of plaintiff.

The evidence defendant gave regarding the admission of responsibility and agreement to pay damages was obviously untrue when weighed against the accepted truth of the girl and

her witnesses. It does therefore form the corroboration of her story in that it is more consistent with defendant's guilt than his innocence.

It is ordered therefore that the appeal be and it is hereby A dismissed with the costs.

For Appellant: Adv. S. T. Pretorius, instructed by Forder, Ritch & Erickson.

For Respondent: Mr. J. M. de Wet, instructed by E. V. Franz.

SOUTHERN NATIVE APPEAL COURT.

KOMANI *v.* QABONGWANA AND ANO..

N.A.C. CASE No. 1 OF 1956.

BUTTERWORTH: 25th May, 1956. Before Balk, President, Warner and Zietsman, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Abandonment of judgment of Chief's Court to be regarded as a waiver—effect of abandonment to be proved in same way as waiver.

Summary: Plaintiff abandoned the judgment given in his favour in a Chief's Court, and in a subsequent action in a B Native Commissioner's Court on the same cause of action, the Court upheld a special plea of *res judicata* holding that the abandonment of the Chief's judgment had the effect of altering the judgment to one for defendant with costs, thus rendering it a final judgment.

C *Held:* That the abandonment of a judgment of a Chief's Court falls to be regarded as a waiver, and that the effect of the abandonment becomes a matter of fact to be proved in the same way as a waiver, i.e. it is never presumed but must be clearly proved by the party relying on it.

D *Held further:* That the first defendant did not establish that the plaintiff abandoned the judgment to the extent that the abandonment was to have the effect of a full judgment for him, and the special plea of *res judicata* therefore failed and should have been dismissed by the Court *a quo.*

E *Cases referred to:*

Wepener v. Joubert, 1943, E.D.L.D. 262.

Laws v. Rutherfurd, 1924, A.D. 261.

Schierhout v. Union Government, 1926, A.D. 286.

Hlatshwayo v. Mare and Deas, 1912, A.D. 232.

F Van Schalkwyk v. Griesel, 1948, (1) S.A. 460 (A.D.)

Southern Insurance Association, Ltd., v. Cooper, 1954, (2) S.A. 354 (A.D.)

Statutes, etc., referred to:

Government Notice No. 2887 of 1951 (Section 17).

G Magistrates' Court Act, 1944 (Section 86).

Government Notice No. 2885 of 1951.

Native Administration Act, 1927 (Section 12).

Appeal from the Court of the Native Commissioner, Willowvale.

Balk (President):—

Good cause having been shown, the late noting of the appeal to this Court was condoned.

The plaintiff (present appellant) sued the two defendants (now respondents) jointly and severally, for five head of cattle or their value, £50, as damages for the seduction and pregnancy of his daughter, averring, *inter alia*, in his particulars of claim that the first defendant was the actual seducer and that the second defendant was also liable for the seduction as the first defendant was, at all material times, resident at, and an inmate of, the second defendant's kraal.

In addition to denying the alleged seduction, the defendants pleaded specially as follows:—

" (*a*) That plaintiff originally sued defendant No. 1 on this same cause of action in the Court of Chief Zwelidumile and obtained judgment in his favour on the 17th January, 1955.

(*b*) That on the 14th April, 1955, the plaintiff abandoned the whole of the said Chief's Court judgment in his favour and by reason of such abandonment the Chief's Court judgment became one for defendant—not one of absolution.

(*c*) Defendants therefore plead *res judicata*."

The Court *a quo* upheld the special plea of *res judicata* and entered judgment for both defendants, with costs, doing so in so far as the second defendant was concerned on the ground that it is not competent to hold the kraalhead liable for a tort apart from the tort-feasor.

The appeal against this judgment is brought on the following grounds:—

" 1. That the judgment was wrong in Law in that the presiding judicial officer erred in holding that there was a final judgment of record in Case No. 1/1955, 'Exhibit A';

2. That the presiding judicial officer further erred in holding that the abandonment by plaintiff (now appellant) of his judgment obtained in the Court of Chief Zwelidumile Sigcau had the effect of altering the judgment to one for defendant with costs *ipso facto;*

3. That in any event in view of the circumstances in which the said judgment was abandoned the presiding judicial officer ought to have exercised his judicial discretion in the interests of equity and natural justice by refusing to uphold a plea of *res judicata*."

In his reasons for judgment the Assistant Native Commissioner referred to Rule 17 of the Rules of this Court, published under Government Notice 2887 of 1951, as amended, and to section *eighty-six* of the Magistrates' Court Act, 1944, and held that, by analogy, the abandonment by a plaintiff of the judgment given in his favour in a Chief's Court automatically brought about a judgment in the defendant's favour, with costs.

But in this conclusion the Assistant Native Commissioner is clearly wrong for the statutory provisions referred to by him apply solely to judgments of Native Commissioners' and Magistrates' Courts, respectively, and find no counterpart in the legislation pertaining to Chiefs' Courts, i.e. in section *twelve* of the Native Administration Act, 1927, as amended, and the regulations for such Courts, published under Government Notice No. 2885 of 1951, as amended.

It follows that the abandonment of a judgment of a Chief's Court falls to be regarded as a waiver, see Wepener v. Joubert, 1943, E.D.L.D. 262, at page 272, and that the effect thereof, i.e. of the abandonment, becomes a matter of fact to be proved in the same way as a waiver, i.e., it is never presumed but must

be clearly proved by the party relying on it, in this instance the defendants, see Laws *v.* Rutherfurd, 1924, A.D. 261, at page 263, and Schierhout *v.* Union Government, 1926, A.D. 286, at page 293.

In the instant case the only proof of the abandonment relied upon by the defendants is the following note in the record of the proceedings of the Native Commissioner's Court in Case No. 1/1955, i.e. in the matter of the appeal by the present first defendant against the judgment of the Chief's Court given for the present plaintiff in the case in which he had sued the present first defendant only on the same cause of action:—

> "Mr. Shelver (respondent's attorney) abandons the judgment in the Chief's Court and tenders costs."

No judgment was entered by the Native Commissioner in Case No. 1/1955 and the note quoted above not only does not indicate specifically the extent to which the judgment was bandoned, i.e. whether it was on the understanding that the abandonment would operate only to the extent of an absolution judgment or as a full judgment for the defendant, but it is more consistent with the former course, in the light of the explanation by the plaintiff's attorney that the judgment was, in fact, abandoned by him solely for the purpose of enabling him to bring a fresh action against both the defendants.

It follows that the first defendant did not establish that the plaintiff abandoned the judgment to the extent that the abandonment was to have the effect of a full judgment for him (first defendant), see Hlatshwayo *v.* Mare and Deas, 1912, A.D. 232, at page 244, Van Schalkwyk *v.* Griesel, 1948, (1), S.A. 460 (A.D.) at page 473, and Southern Insurance Association, Ltd., *v.* Cooper, 1954, (2) S.A. 354 (A.D.), at page 362.

The special plea of *res judicata* therefore failed and should have been dismissed by the Court *a quo*.

Here it should be mentioned that this judgment must not be construed as deciding that it is competent to join the kraalhead as second defendant in the circumstances of the instant case as this point is not here properly before this Court.

In the result, I am of opnion that the appeal to this Court should be allowed, with costs, that the judgment of the Court *a quo* should be set aside and in lieu thereof an entry made in the record "the special plea of *res judicata* is dismissed, with costs" and that the case should be remitted to the Court *a quo* for trial to a conclusion.

H. W. Warner (Permanent Member): I concur.

V. R. Zietsman (Member): I concur.

For Appellant: Mr. Brian Shelver, Idutywa.

For Respondent: Mr. L. D. Dold, Willowvale.

SOUTHERN NATIVE APPEAL COURT.

MBULAWA *v.* MBULAWA.

N.A.C. CASE No. 52 OF 1955.

PORT ST. JOHN'S: 30th May, 1956. Before Balk, President, Warner and Grant, Members of the Court.

PONDO LAW AND CUSTOM.

Practice and Procedure—Pondo law and custom—Succession—heirless qadi *or* isitembu *house becomes inheritance of senior house to which it is affiliated—Opinions of Native assessors—Practice and procedure—Late noting of appeal—Application for condonation of—Person lodging notice of appeal is himself liable and required to stamp it—Amendment of ground of appeal.*

Summary: In an action in which he sought to be declared the heir of the fourth house of the late Mbulawa Magcina, plaintiff contended that according to Pondo law and custom the heir of the Great House is the heir of all the minor houses in which there is no male issue.

Counsel for appellant contended that the application for condonation of the late noting of the appeal was unnecessary as the notice of appeal together with the requisite revenue stamps had been lodged timeously with the Clerk of the Court by appellant's attorney.

Held: Under Pondo Law and Custom the fourth wife becomes the *qadi* or *isitembu* of the Right Hand House, and in the absence of heirs in the *qadi* or *isitembu* house the latter becomes an inheritance of the Right Hand House.

Held further: That the appeal was not noted timeously and the application for condonation of the late noting was therefore necessary because, to comply with the provisions of section *twenty* of the Stamp Duties and Fees Act, 1911, as amended, appellant's attorney should have ensured that the stamps were affixed to the notice of appeal when it was lodged with the Clerk of the Court.

Cases referred to:

Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 (A.D.)

Els *v.* Maree, 1952 (3) S.A. 758 (O.P.D.).

Fineberg *v.* Horwitz, 1950 (3) S.A. 371 (T.P.D.).

Tsweleni *v.* Nyila, 1 N.A.C. 256.

Mkawayi *v.* Kiloti, 3 N.A.C. 193.

Manjezi *v.* Manjezi, 1942, N.A.C. (C. & O.F.S.) 49.

Notshila *v.* Notshila, 1 N.A.C. (S.D.) 12.

Sigcau *v.* Sigcau, 1944 A.D. 67.

Statutes, etc. referred to:

Stamp Duties and Fees Act, 1911 (section *twenty*).
Government Notice No. 2887 of 1951 [section *seven* (*b*)].
Government Notice No. 2885 of 1951 (section *twelve*).

Appeal from the Court of the Native Commissioner, Lusikisiki.

Balk (President):

In this matter application for condonation of the late noting of the appeal was duly made but counsel for appellant submitted that in his view there was no need for such application as the notice of appeal together with revenue stamps to the value of 7s. 6d. had been lodged timeously with the Clerk of the Court by the appellant's attorney who could not be held responsible for the Clerk's placing the stamps inadvertently on another document and only affixing them to the Notice of Appeal when the error was discovered at a later date after the period allowed for the noting of the appeal had expired.

It is clear, however, from the provisions of section *twenty* of the Stamp Duties and Fees Act, 1911, as amended, which are peremptory, that the person lodging the notice of appeal is liable and required to stamp it so that the appellant's attorney could not divest himself of his responsibility to do so by lodging loose stamps with the Clerk of the Court. In other words in order to comply with the provisions mentioned he should have ensured that the stamps were affixed to the notice of appeal when it was lodged with the Clerk of the Court.

It follows that the appeal was not noted timeously and that the application for condonation of the late noting was necessary.

The appellant, however, was in no way to blame for the late noting so that,, on the authority of Rose and Another *v.* Alpha Secretaries, Ltd. 1947 (4) S.A. 511 (A.D.), he should not be debarred from having his appeal heard by this Court.

The application was accordingly granted.

The appeal is from the judgment of a Native Commissioner's Court reversing, on appeal, the judgment of a Chief's Court, given for the plaintiff (present appellant) in an action in which he sought a declaration of rights that he was the heir of the fourth house of the late Mbulawa Magcina (hereinafter referred to as "the deceased") and, as such, entitled to succeed to the property therein.

The ground of appeal to this Court, as set out in the notice, is that the judgment of the Court *a quo* is contrary to Pondo law and custom. Application was made to amend this ground to read as follows:—

> "The judgment is against Pondo law and custom because according to Pondo custom the heir of the Great House is the heir of all the minor houses in which there is no male issue, and that therefore appellant, as heir of the Great House of the late Mbulawa, is also heir of the fourth house of the late Mbulawa."

The question arose whether the ground of appeal as originally given had been stated clearly and specifically as required by Rule 7 (*b*) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended; for if it had not been so stated, the notice would be invalid and an amendment thereof incompetent, see Els *v.* Maree, 1952 (3) S.A. 758 (O.P.D.). In the instant case, however, the record discloses that the custom referred to in the notice of appeal can only be the custom set out in the application for the amendment so that the amendment was permissible and was allowed, see Fineberg *v.* Horwitz, 1950 (3) S.A. 371 (T.P.D.).

The facts of this case are admitted. The deceased, a Pondo commoner, had four wives according to Native custom. The plaintiff and the defendant (now respondent) are the heirs of the deceased's Great House and Right Hand House, respectively. The only son of the deceased's fourth house predeceased the latter, leaving no male issue, so that there is no heir in that house. On the 10th March, 1949, the deceased stated in the presence, *inter alia,* of the Native Commissioner, Lusikisiki, and the parties to the instant action, that the heir of His Right Hand House (defendant) should succeed to the property in his fourth house.

It seems to me that this statement by the deceased does not properly form an issue in the instant case either as part of a final disposition by him of his estate or as an apportionment by him of property therein because the admissions on which the case was decided in the Court *a quo*—no evidence was led in that Court—do not appear to cover such an issue; nor does such an issue appear to be covered by the pleadings in the Chief's Court, as set out on the relative form N.A. 502 which, it should be added, were not amplified or amended in terms of section *twelve* of the Regulations for Chiefs' and Headmens' Civil Courts, published under Government Notice No. 2885 of 1951, as amended. It is true that a note appears in the records that, on the statement of admitted facts being handed in in the Court *a quo,* it was agreed that the point for decision was whether the deceased acted in accordance with custom when he apportioned the daughter in his fourth house to his Right Hand House. But, as pointed out above, this aspect is not only not covered by the admissions in the Court *a quo* in which no evidence was led, but is in any event not covered by the pleadings so that it does not arise. That this is the position is also apparent from the Native Commissioner's judgment declaring the defendant to be the heir of the deceased's fourth house. The deceased's statement, therefore, appears to amount to no more than the expression of opinion and the sole point for decision resolves itself to the question of who is the heir to the deceased's fourth house according to Pondo law and custom.

In his reasons for judgment, the Chief states that, under Pondo law and custom, the heir of the Great House of a deceased kraalhead is the latter's general heir and, as such, is entitled to

succeed to the property in all the deceased's other houses in which there are no heirs. The Chief goes on to state that, unlike other tribes which, in dividing their families into houses, make provision for a *qadi*, the Pondos have no *qadi* house. But the Chief is wrong in this view; for, as is apparent from a series of decisions of this Court over a lengthy period, as also from a judgment of the Appellate Division of the Supreme Court, under Pondo law and custom the third wife of a commoner automatically becomes the *qadi* or *isitembu* of his Great House and his fourth wife the *quadi* or *isitembu* of his Right Hand House and so on; see Tsweleni *v.* Nyila 1 N.A.C. 256, Mkwayi *v.* Kiloti 3 N.A.C. 193, Manjezi *v.* Manjezi 1942 N.A.C. (C. and O.F.S.) 49, Notshila *v.* Notshila 1 N.A.C. (S.D.) 12 and Sigcau *v.* Sigcau 1944 A.D. 67. Not only is this the case, but, as is manifest from Tsweleni's case (*supra*), the *qadi* or *isitembu* house in the absence of heirs therein forms an inheritance either of the Great House or Right Hand House depending upon to which of these two houses it is affiliated by the order of the customary union as indicated above; i.e., the third house in the absence of an heir therein becomes an inheritance of the Great House and similarly the fourth house of the Right Hand House and so on. This aspect was put to the Pondo Assessors whose replies are appended at the foot of this judgment. I am in agreement with their opinion that the senior house to which the *qadi* or *isitembu* is affiliated, succeeds to the property of the latter in the absence of an heir therein.

It follows that the judgment of the Court *a quo* allowing the appeal from the Chief's Court and altering the latter's judgment for the plaintiff to one for defendant and declaring the latter to be the heir of the deceased's fourth house, is correct.

Accordingly the appeal to this Court falls to be dismissed, with costs.

Opinion of Native Assessors.

Assessors in attendance.

1. Matapele Sontsele from Bizana District.
2. Johnson Hlawatika from Ngqeleni District.
3. Tolikana Mangala from Libode District.
4. Mdabuka Mqikela from Lusikisiki District.
5. Lumayi Langa from Flagstaff District.

Question by President to Assessors.

A Pondo commoner had four customary wives. On his death he left sons by his first three wives but only daughters by his fourth wife, the only son by that wife having predeceased him. Who is the heir according to Pondo law and custom to the house of the fourth wife?

Reply by Tolikana Mangala.

The third wife is the *qadi* to the Great House and failing an heir in her house, the heir of the Great House succeeds thereto i.e. to the third house. The fourth wife is the *qadi* to the Right Hand House and failing an heir in her house, the heir of the Right Hand House becomes the heir of the fourth house

All the other assessors agree.

H. W. Warner (Permanent Member). I concur.

D. S. Grant (Member): I concur.

For Appellant: Mr. Stanford, Flagstaff.

For Respondent: Mr. Birkett, Port St. John's.

SOUTHERN NATIVE APPEAL COURT.

NOMBIDA *v.* FLAMAN.

N.A.C. CASE No. 10 OF 1956.

PORT ST. JOHN'S 30th May, 1956. Before Balk, President, Warner and Grant, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Conflict of laws—Guardianship of children of civil marriage after death of both parents—Common law to be applied—Judicial officer must record specifically which system of law he applied in determining case.

A *Summary:* Appellant contended that, after the death of both natural guardians, i.e. the parents, of the children whose guardianship he sought, the common law was no longer applicable in determining the guardianship of the children in that the rights of both the parents in this connection B had terminated on their death and their marriage was, therefore, no longer any criterion. That being so and as he (plaintiff), the defendant and the latter's late father were Natives who observed Native custom, Native law should be applied in deciding the guardianship of the children; and C as he (plaintiff) was the children's guardian according to that system of law, he should be awarded their custody.

Held: That the children remain the issue of a civil marriage notwithstanding the death of both their parents and, as a civil marriage is a common law institution foreign to Native D law, it is no more than just that common law should continue to be applied in deciding the guardianship of the children, particularly as that legal system is the more advanced one.

Cases referred to:

Bujela *v.* Mfeka, 1953, N.A.C. 119 (N.E.).

E Mdema *v.* Garane, 5 N.A.C. 199.

Ngcobo *v.* Ngcobo, 1944, N.A.C. (C. and O.) 16.

Morai *v.* Morai and Another, 1948, N.A.C. (C. and O.) 14.

Ledwaba *v.* Ledwaba, 1 N.A.C. (N.E.) 398.

Mosehla *v.* Mosehla, 1952, N.A.C. 105 (N.E.).

F Ex Parte Minister of Native Affairs in *re* Molefe *v.* Molefe, 1946 A.D. 315.

Ntsimango *v.* Ntsimango, 1 N.A.C. (S.D.) 143.

Nkambula *vs.* Linda, 1951 (1) S.A. 377 (A.D.).

G Ex Parte Minister of Native Affairs: in *re* Yako *v.* Bevi, 1948 (1) S.A. 388 (A.D.).

Umvovo *v.* Umvovo, 1953 (1) S.A. 195 (A.D.).

Appeal from the Court of the Native Commissioner, Port St. John's.

Balk (President):

H Good cause having been shown, the late noting of the appeal was condoned.

The plaintiff (present appellant) sued the defendant (now respondent) in a Native Commissioner's Court for an order declaring him (plaintiff) to be the legal guardian of the minor I son and minor daughter of his late brother, Richard, and for the restoration of their custody to him.

The Court *a quo* dismissed the summons, with costs, and the appeal against the judgment is brought on the following grounds:

"1. That the judgment is against the weight of the evidence, the probabilities of the case and the proved facts.

2. That the judgment is bad in law in that marriage under the Common Law of the Union of South Africa does not necessarily exempt them from the scope and operation of Native Law and Custom and from the traditions and usages of their race and tribes.

3. That marriage under the Common Law only affects the personal status of the spouses between themselves as spouses, but does not affect nor determine questions of guardianship of their offspring after the death of the spouses, nor the devolution of their estates, which all remain still governed by Native Law and Custom unless by special statutory exceptions which have no application in the present case."

The facts are common cause. The children are the issue of a civil marriage between the plaintiff's younger brother, Richard, and the defendant's sister, Mercy. Dowry was paid for the latter. Both Richard and Mercy are dead. After Richard's death, Mercy went to her father's kraal, where she lived with the children. After her death, the children continued to live at that kraal with her father, Solomon, who refused to let the plaintiff have them. Solomon and his wife looked after the children at that time. On Solomon's death, the children remained at his kraal. The defendant is Solomon's son and heir and the plaintiff is the nearest adult male relative to his late brother, Richard.

It is unnecessary to consider the first ground of appeal as the facts are not in dispute.

The second and third grounds of appeal resolve themselves to the question whether the conclusion of the Court *a quo* that common law should be applied in deciding the instant case, was, in the circumstances, a proper one, i.e., one which it could properly arrive at.

Although the Native Commissioner has not stated specifically which system of law he applied in determining the instant case, i.e. Common Law or Native Law, it is apparent from his reasons for judgment that he, in fact, decided it according to Common Law. Here his attention is invited to Bujela *v.* Mfeka 1953 N.A.C. 119 (N.E.) and the cases referred to in the penultimate paragraph on page 121 of the report of that judgment, in which the necessity for recording this information specifically, is stressed.

Apropos of the third ground of appeal it should be mentioned that there is nothing in the record indicating that the children inherited anything; nor does any question of property rights in either of the children arise, such as, for example, the right to any dowry payable for the female child, the sole question for decision here being whether the plaintiff is the legal guardian of the children and, as such, entitled to their custody.

It has been held both by this Court (including the Native Appeal Court for the Transkeian Territories which it superseded) and the North-Eastern Native Appeal Court that the Common Law falls to be applied in determining the question of the custody of minor children which are the issue of civil marriage, see Mdema *v.* Garane 5 N.A.C. 199, Ngcobo *v.* Ngcobo 1944 N.A.C. (C. & O.) 16, Morai *v.* Morai and Another 1948 N.A.C. (C. & O.) 14, Ledwaba *v.* Ledwaba 1 N.A.C. (N.E.) 398, Mosehla *v.* Mosehla 1952 N.A.C. 105 (N.E.). These decisions gain support from the judgment in Ex Parte Minister of Naitve Affairs in *re* Molefe *v.* Molefe 1946 A.D. 315 for, although that case deals with the proprietary rights of Native spouses of a civil marriage, the principle enunciated therein that such rights fall to be determined according to Common Law in the absence of any statutory provision to the contrary, applies with equal force where the right to be determined is that of the custody of the minor children of a civil marriage between Natives.

But, in all the cases cited in the last preceding paragraph, the right in question was claimed by one or other of the spouses of the civil marriage, and there appears to be no decided case dealing with the custody of a minor child of a civil marriage between Natives, after the death of both its parents.

The appellant's contention is that, after the death of both natural guardians of the children, i.e., their parents, the Common Law was no longer applicable in determining the guardianship of the children in that the rights of both the parents in this connection had terminated on their death and their marriage was, therefore, no longer any criterion. That being so and as he (plaintiff), the defendant and the latter's late father were Natives who observed Native Custom, Native Law should be applied in deciding the guardianship of the children; and as he (plaintiff) was the children's guardian according to that system of law, he should be awarded their custody.

But, to my mind, this contention is unsound as will be apparent from what follows.

In the first place, the plaintiff's allegation in his evidence-in-chief that he, the defendant and the latter's late father observed Native Custom, is controverted by his admission in cross-examination that he (plaintiff) was married according to civil rights and that he did not dispute that the defendant's late father had also been so married. Here it should be mentioned that the defendant is an unmarried minor.

Secondly, the children remain the issue of a civil marriage notwithstanding the death of both their parents and, as a civil marriage is a common law institution foreign to Native Law, it is no more than just that Common Law should continue to be applied in deciding the guardianship of the children, particularly as that legal system is the more advanced one.

There therefore appears to be no good reason for adopting the change in legal systems contended for by the appellant.

It is true that dowry was paid for the children's mother. But dowry, being purely a Native Law institution, plays no part in a civil marriage and a civil marriage precludes the co-existence of a customary union between the same parties, so that the fact that dowry was paid for the children's mother is of no moment in the instant case, see Ntsimango *v.* Ntsimango 1 N.A.C. (S.D.) 143, at page 144, Nkambula *v.* Linda 1951 (1) S.A. 377 (A.D.), at page 382. It should be added that the plaintiff, in his evidence, made it clear that he had not been appointed the guardian of the children and that he claimed to be their legal guardian solely under Native Law and Custom; and, as pointed out above, no estate or property rights in the children are here involved.

In these circumstances and bearing in mind the principles governing the application of one or other of the legal systems in question, viz., those enunciated in Ex Parte Minister of Native Affairs: in *re* Yako *v.* Beyi 1948 (1) S.A. 388 (A.D.), read with Umvovo *v.* Umvovo 1953 (1) S.A. 195 (A.D.), the Native Commissioner's conclusion to apply Common Law in deciding the instant case falls to be regarded as a proper one, and the appeal should accordingly be dismissed, with costs.

H. W. Warner (Permanent Member): I concur.

D. S. Grant (Member): I concur.

For Appellant: Mr. Stanford, Flagstaff.

For Respondent: Mr. Birkett, Port S. John's.

SOUTHERN NATIVE APPEAL COURT.

NTSABALALA *v.* PITI.

N.A.C. CASE No. 12 OF 1956.

PORT ST. JOHN'S: 30th May, 1956. Before Balk, President, Warner and Grant, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Any judgment of Chief's Civil Court may be taken on appeal—Quantum of dowry refundable—Assessment thereof not affected by trival ill-treatment of his wife by plaintiff—Costs of appeal—Native Commissioner to give reasons for finding of fact.

Summary: In the Chief's Court, plaintiff claimed from defendant the restoration of his wife or ten head of cattle paid for her as dowry; and judgment, by default, was entered for plaintiff for ten head of cattle or their value, £80, with costs.

Defendant appealed to the Native Commissioner's Court which thereupon gave judgment for plaintiff for the restoration of his wife or the refund to him of £8 *vulamlomo*, a horse or its value, £15, and four head of cattle or their value, £32.

Held: That *any* judgment of a Chief's Civil Court may be taken on appeal.

Held further: That the alleged ill-treatment by plaintiff of his wife was of such a trivial nature that the Native Commissioner properly did not hold this against the plaintiff in determining the quantum of dowry refundable to him.

Held further: That the values of dowry stock must be proved where the values claimed are in excess of standard values.

Held further: That the costs of appeal to the Native Appeal Court are not affected by the reduction of the value placed on the returnable dowry stock by the Court *a quo* because (*a*) the reduction was relatively small and (*b*) because the value in question was not specifically appealed against.

Cases referred to:

September *v.* Mpolase, 1937 N.A.C. (C. & O.) 138.

Zakaza *v.* Pennington, 4 N.A.C. 192.

Xakata *v.* Kupuka, 2 N.A.C. 62.

Mahleza *v.* Ndandana, 1945 N.A.C. (C. & O.) 31.

Electric Process Engraving and Stereo *v.* Irwin, 1940 A.D. 220.

Maphasa *v.* Mbongwe, 1946 N.A.C. (C. & O.) 48.

Gijana & Another *v.* Mangali, 1946 N.A.C. (C. & O.) 60.

Statutes, etc. referred to:

Government Notice No. 2885 of 1951 [sections *two* (3), *nine* (1) and 12)].

Native Administration Act, 1927 (sections *twelve* (4), and *fifteen*).

Government Notice No. 2886 of 1951 [section *eighty-one* (2)].

Magistrates' Courts Act, 1944 (section *eighty-three*).

Government Notice No. 2887 of 1951 [section *nine* (1), (*b*)].

Appeal from the Court of the Native Commissioner, Flagstaff.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court, altering, on appeal, the judgment of a Native Chief's Court.

In the Chief's Court, the plaintiff (now respondent) claimed from the defendant (present appellant) the restoration of his wife or ten head of cattle paid for her as dowry; and judgment, by default, was entered in that Court for the plaintiff for ten head of cattle or their value, £80, with costs.

The defendant did not make application in the Chief's Court, in terms of section 2 (3) of the Regulations pertaining to those Courts, published under Government Notice No. 2885 of 1951, as amended, for the rescission of the default judgment, but brought the matter directly on appeal to the Native Commissioner's Court. The question whether the defendant should have exhausted his remedies in the Chief's Court before bringing the appeal to the Native Commissioner's Court was not raised either in this Court or in the Court *a quo* so that this point does not call for a decision. But it is perhaps as well here to draw attention to the provisions of section 12 (4) of the Native Administration Act, 1927, as amended, and section 9 (1) of the Regulations for Chief's Civil Courts, referred to above, from which it is clear that *any* judgment of a Chief's Civil Court may be taken on appeal, unlike the position in the case of judgment of Native Commissioners' and Magistrates' Civil Courts which may only be appealed from if they have the effect of final judgments, see Rule 81 (2) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, and section *eighty-three* of the Magistrates' Court Act, 1944.

The appeal to this Court is against the alternative judgment of the Court *a quo* only, i.e. the part requiring the defendant to refund to the plaintiff, on failure of the return to the latter of his wife by the date specified, £8 *vulamlomo,* a horse or its value, £15, and four head of cattle or their value, £32, and is brought on the ground that that part of the judgment is against the weight of the evidence.

Whilst advantage was not taken of the provisions of section *twelve* of the Regulations for Chief's Civil Courts referred to above, correspondence between the parties' attorneys was put in by consent in the Court *a quo,* which amplified the claim by including a horse and £8 *vulamlomo* in the dowry and set out the defence.

The plaintiff's case is that he contracted a customary union with the defendant's daughter, Magamndana, in the year 1951 and that in respect of this union the defendant was paid, on his (plaintiff's) behalf, £8 *vulamlomo* in cash, an *nqutu* beast, a young ox which was slaughtered by the defendant's people, and a horse and eight head of cattle as dowry. Whilst he (plaintiff) was away at work he received a report as a result of which he wrote to the defendant asking him to return his wife, Magamndana. The defendant replied that Magamndana was with him and that she had been accused of witchcraft by his (plaintiff's) father. On his return from work he was ill and asked his father to fetch his wife from the defendant's kraal. His father returned without her. Thereafter, on the advice of his father, he offered to pay the defendant a fine of a beast for his wife. The defendant eventually refused to accept this beast and his wife did not return to him so he brought the instant action. He admitted that his wife had been pregnant once but stated that no children had been born to her.

The defendant admitted that the plaintiff had entered into a customary union with his daughter, Magamndana, but alleged that he had received in all nine head of dowry cattle for her and that these cattle included a heifer and an ox delivered to him in lieu of the £8 *vulamlomo* in cash and the horse, respectively, which he had demanded but not received. He alleged that his daughter had been accused of witchcraft by the plaintiff's father and that the plaintiff had ill-treated her by assaulting her. He also alleged that whilst his daughter was the plaintiff's wife she had a miscarriage, then a child which died in infancy, and then two further miscarriages.

The Native Commissioner *a quo* found that £8 *vulamlomo,* one horse and eight head of cattle were paid by the plaintiff to the defendant as dowry for the latter's daughter, Magamndana, that the plaintiff at no time had any part in the alleged accusation of witchcraft and that the plaintiff had not ill-treated Magamndana to an extent that called for the forfeiture of his right to the refund of any of the dowry he had paid for her.

The Native Commissioner also found that defendant's allegation that Magamndana had a child whilst she was the plaintiff's wife had been substantiated as also one of the three alleged miscarriages she had then, viz., the last one alleged.

Accordingly, the Native Commissioner allowed as deductions from the dowry returnable by the defendant, one beast for the child, a second beast for the miscarriage which had been proved, a third beast for the wedding outfit, which it is common cause was provided by the defendant, and, consonant with Pondo custom which applies here, a fourth beast for Magamndana's services to the plaintiff whilst his wife, and ordered that, failing Magamndana's return to the plaintiff by the specified date, the defendant was to return to him the balance of the dowry paid for her, viz., £8 *vulamlomo,* a horse and four head of cattle.

Although the Native Commissioner found that eight head of cattle had been paid as dowry, he also found that nine head of cattle had in fact been transferred to the defendant. He does not state in his reasons for judgment why he did not take the one beast into account in determining the quantum of the dowry. It may be that he did not do so because he accepted the plaintiff's version that one of the cattle was an *ngutu* beast which is not refundable on a claim for the return of the dowry even where the custom is not recognised, as is the case with the Pondos, see September v. Mpolase 1937 N.A.C. (C. & O.) 138, at page 140.. Be that as it may, it is of no moment in the instant case as the defendant admitted receiving nine head of cattle as dowry which did not include an *ngutu* beast and there is no cross-appeal. In this connection Counsel for respondent (plaintiff) pointed out that, according to the evidence for plaintiff, a beast, i.e. the young ox referred to above, had been paid to the woman of the kraal at which Magamndana had been living when the plaintiff eloped with her and that this ox had been slaughtered by them so that it formed the *ngutu* beast proper. He went on to say that, this being so, it was clear that the defendant had received nine head of cattle exclusive of the *ngutu* and that this Court in the exercise of the powers vested in it by section *fifteen* of the Native Administration Act, 1927, as amended, should increase the award in the plaintiff's favour by one beast. Whilst there is force in his submission that the defendant received nine head of cattle exclusive of the *ngutu* beast, it seems to me that it would not here be proper to increase the award as it was open to the plaintiff to cross-appeal and he did not do so thereby indicating that he was satisfied with the judgment.

In view of the defendant's admission that he received nine head of cattle as dowry, the finding of the Court *a quo* that he had been paid eight head of dowry cattle cannot be said to be wrong in so far as he (appellant) is concerned, so that all that remains to be considered in connection with the payment of the dowry is whether the defandant also received £8 in cash as *vulamlomo* and a horse.

The Native Commissioner found that the defendant actually did receive these items but unfortunately has not given reasons for this finding. Here the necessity for proper compliance with Rule 9 (1) (*b*) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, which requires a Native Commissioner to state in his reasons for judgment the ground upon which he arrived at a finding of fact, must once more be emphasised as failure to do so results in this Court's being involved in difficulties which may well have been avoided.

The plaintiff's version as to the payment of the £8 *vulamlomo* in cash and the horse is fully borne out by his witness, Julius Folweni, who was one of his messengers when his customary union with Magamndana was arranged, and by his father, Piti Mhlekwa.

It is true that there is, as pointed out by Counsel for appellant, a seeming discrepency between the plaintiffs evidence and that of his father as regards those present when the £8 was paid; but, on a proper consideration of this evidence, it is manifest that the discrepancy may well be more apparent than real for Gantso mentioned by Piti may be his name for the plaintiff.

The only witnesses to testify for the defendant, other than himself, in connection with the payments he received in respect of Magamndana's customary union with the plaintiff, are Mapenduka Soboyisa and Gayikana Mdinwa.

Apart from the fact that there is a material discrepancy between the defendant's evidence and that of Mapenduka in regard to the number of the dowry stock initially demanded by the former, it is significant that Mapenduka makes no mention in his evidence of a beast having been paid in lieu of the horse demanded by the defendant as alleged by the latter in his testimony; and it is implicit in Gayikana's evidence that his knowledge in so far as concerns the dowry is limited to the period during which the actual cattle were paid and that he has no knowledge of incidents during the antecedent period when it is alleged that the £8 *vulamlomo* and the horse were paid.

It follows that the probabilities favour the plaintiff's version that he paid the £8 and the horse and that the Native Commissioner's finding to that effect cannot be said to be wrong.

As regards the defendant's allegations that his daughter had been accused of witchcraft and that the plaintiff had ill-treated her, it is manifest from the evidence as a whole that the plaintiff at no time had any part in the alleged accusation and that the alleged ill-treatment was at most confined to an isolated assault of a trivial nature, so that the Native Commissioner properly did not hold these allegations against the plaintiff in determining the quantum of dowry refundable to him in the event of his wife's failure to return. see Zakaza *v.* Pennington 4 N.A.C. 192 and Xakata v. Kupuka 2 N.A.C. 62.

Turning to the remaining matter in dispute, viz., the question whether Magamndana bore a child and had three miscarriages during the subsistence of her customary union with the plaintiff, the Native Commissioner found, as indicated above, that she had borne the child but had in fact only had one miscarriage, viz., the last one, which was admitted by the plaintiff. As pointed out by the Native Commissioner in his reasons for judgment there are material discrepancies in the evidence for the defendant in regard to the miscarriages and this is so particularly in Magamndana's evidence as to the time when the plaintiff returned from work in relation to her alleged third pregnancy. Then, as also pointed out by the Native Commissioner, it is strange that the defendant's witness, Gayikana, who testified that he was a frequent visitor at the defendant's kraal and was present at the burial of Magamndana's child there, should not have been aware of her second miscarriage at that kraal, resulting from her third pregnancy. Here it should be mentioned that the Native Commissioner does not appear to be justified in his conclusion that it was contrary to custom to have buried Magamndana's miscarriages seeing that in each case a fully formed child was involved. However this misdirection does not, to my mind, affect the Native Commissioner's finding that the defendant has not discharged the onus resting on him to prove the first and second miscarriages. I come to this conclusion in view of the discrepancies and improbability referred to above and also regard being had to the fact that Magamndana was the only person who professed to have first hand knowledge of her first miscarriage.

A further point remains to be dealt with, viz., the question of the values placed by the Court *a quo* on the returnable dowry stock.

Whilst it is inferable from the defendants' evidence that the value of a beast was £8, for he stated that one beast was the equivalent of £8 *vulamlomo,* there is nothing in the record indicating that the value of the horse was £15. On the contrary, the horse was, according to the evidence, regarded as the equivalent of one beast so that its value should also have been fixed at £8 instead of £15 by the Court *a quo,* see Mahleza v. Ndandana 1945 N.A.C. (C. & O.) 31. But this reduction does not, in my opinion, affect the costs of the appeal to this Court; firstly, because it is clear that the object of the appeal was to attack the greater part of the alternative judgment and the appellant (defendant) has only succeeded in reducing it by the relatively small sum of £7; and, secondly, because it was not specifically stated in the notiec of appeal that the value placed by the Court *a quo* on any of the returnable dowry animals was being called into question, see Electric Process Engraving and Stereo v. Irwin 1940 A.D. 220, at page 235, Maphasa *v.* Mbongwe 1946 N.A.C. (C. & O.) 48, at jage 50, and Gijana & Another *v.* Mangali 1946 N.A.C. (C. & O.) 60.

The appeal to this Court does not cover the question of the award by the Court *a quo* of costs to the plaintiff both in that and in the Chief's Court so that this aspect does not call for consideration.

In the result I am of opinion that the appeal to this Court should be dismissed, with costs, but that the judgment of the Court *a quo* should, for the reasons given above and to put it in proper form, be altered to read as follows:—

> "The appeal is dismissed, with costs, but the judgment of the Chief's Court is altered to read 'For plaintiff for the return to him of his wife, Magamndana, by the 25th February, 1956, failing which, for the refund to him of the following dowry: £8 in cash and one horse and four head of cattle or their value calculated at £8 each, i.e., £40 for the five animals, with costs'."

H. W. Warner (Permanent Member): I concur.

D. S. Grant (Member): I concur.

For Appellant: Mr. Werner, Flagstaff.

For Respondent: Mr. Stanford, Flagstaff.

SOUTHERN NATIVE APPEAL COURT.

NGOMBANE *v.* MANKAYI.

N.A.C. CASE No. 71 OF 1955.

UMTATA: 13th June, 1956. Before Balk, President, Warner and Midgley, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Judicial Officer not entitled to draw inference adverse to plaintiff's credibility where latter's evidence conflicts with particulars of claim formulated by latter's attorney—Judicial Officer must record outcome of any application—Extreme care to be exercised in checking of typewritten copies of records.

Summary: At the commencement of the hearing of the case in the Native Commissioner's Court the plaintiff's attorney applied for the amendment of paragraph 3 of the particulars of claim.

In delivering judgment the Assistant Native Commissioner drew an inference adverse to the plaintiff's credibility for the reason that the latter's evidence conflicted with the averment in paragraph 3 of the particulars of claim as initially set out in the summons.

Held: That the Assistant Native Commissioner should not have drawn the inference he did for, apart from the fact that an amendment of paragraph 3 of the particulars of claims was applied for and not opposed, the summons was formulated, not by the plaintiff, but by his attorney, and there is nothing in the record to indicate that the plaintiff instructed his attorney precisely in terms of the unamended paragraph 3 and that its wording was in fact not due to an error or misunderstanding on the attorney's part.

Cases referred to:

Seedat *v.* Tucker's Shoe Co., 1952 (3) S.A. 513 (T.P.D.)

Appeal from the Court of the Native Commissioner, Tsolo.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance in an action in which the plaintiff (present appellant) claimed from the defendant (now respondent) certain three head of cattle or their value, £47, averring in his particulars of claim that:—

"1. The parties hereto are Natives.

2. That in or about December, 1949, the defendant on behalf of his son Kolisile paid as part dowry to plaintiff a certain young black heifer.

3. Plaintiff ear-marked and branded the said heifer and left it in possession of defendant pending transfer of it into his name in the dipping records.

4. Defendant failed to effect transfer of the said heifer, now a cow, into plaintiff's name and the said cow has increased by a red heifer and a black bull calf which are in defendant's possession.

5. Plaintiff values the black cow at £16, the red heifer at £17 and the black bull calf at £14.

6. Despite demand thereto defendant refuses to deliver the said three animals to plaintiff."

The defendant pleaded as follows:—

"1. Paragraph 1 of the plaintiff's particulars of claim is admitted.

2. Defendant denies paragraph 2 and puts plaintiff to the proof thereof.

3. That save for admitting that plaintiff earmarked and branded a certain cow belonging to defendant, defendant denies that such earmarking and branding was made on the said beast while it was still a heifer or that it was lawful and puts plaintiff to the proof of his allegations.

In amplification of his denial defendant states that during 1954 plaintiff wrongfully and unlawfully ear-marked and branded a black cow that was the lawful property of defendant.

4. That save for admitting that the said black cow has increased as stated in paragraph 4 of the plaintiff's particulars of claim defendant denies that he had and/or has the obligation and/or duty to effect transfer of the said black cow and its increase to plaintiff.

5. Defendant admits paragraphs 5 and 6.

Wherefore by reason of the premises above set forth defendant prays the above Honourable Court that plaintiff's claim be dismissed with costs of suit."

The appeal is brought on the following grounds:—

"1. That the Acting Native Commissioner erred in not entering judgment for plaintiff with costs in that—

(*a*) Plaintiff proved his case and was supported by the witness Headman Mtyato who was called as a witness by the defence;

(*b*) The defence evidence was unsatisfactory in that the defence witnesses contradicted each other on all material points.

2. That the judgment was against the proved facts, the general weight of evidence and the probabilities of the case."

At the commencement of the hearing of this case in the Court *a quo,* the plaintiff's attorney applied for the amendment of paragraph 3 of the particulars of claim by substituting therefor the following paragraph:—

"3. Plaintiff left heifer in the possession of defendant pending transfer of it to him in the dipping registers."

The presiding Assistant Native Commissioner did not record the outcome of this application but as it appears from his notes that the defendant's attorney intimated that he had no objection thereto, the particulars of claim were regarded in this Court as amended in accordance with the application. Here it must be emphasised that the outcome of any application in a Native Commissioner's Court must be recorded by the presiding judicial officer.

As pointed out by the Assistant Native Commisisoner in his reasons for judgment, there are inconsistencies in the evidence for plaintiff.

But, as submitted by Counsel for appellant, the Assistant Native Commissioner should not have drawn an inference adverse to the plaintiff's credibility because the latter's evidence conflicted with the averment in paragraph 3 of the particulars of claim as initially set out in the summons; for, apart from the fact that, as pointed out above, an amendment of that paragraph was applied for and not opposed, the summons was formulated, not by the plaintiff, but by his attorney and there is nothing in the record to indicate that the plaintiff instructed his attorney precisely in terms of the unamended paragraph 3 of the particulars of claim and that its wording was in fact not due to an error or misunderstanding on the attorney's part, see Seedat *v.* Tucker's Shoe Co., 1952 (3) S.A. 513 (T.P.D.) at page 516.

As also submitted by Counsel for appellant, the Assistant Native Commissioner should also not have come to the conclusion that it was improbable that the restrictions in regard to the movement of cattle in the area concerned continued for a period of, from four to five years, as alleged by the plaintiff in his testimony, as such an inference cannot properly be drawn from the evidence as a whole, which, apart from the plaintiff's referred to above, is, in so far as this aspect is concerned, limited to the testimony of one of the plaintiff's witnesses, who did not live in the same locality as the parties, that "there are sometimes restrictions up to a year".

The inconsistency in the evidence for the plaintiff as regards his having gone to the defendant's kraal about the black cow after the enquiry held by the Headman in connection with its branding by the plaintiff, does not appear to me to affect the probabilities to any appreciable extent since, even though the evidence given for plaintiff by his elder brother tends to corroborate the evidence for defendant that the plaintiff came to the defendant's kraal after the enquiry held by the Headman and apologised for having branded the black cow, it is not probative

of the plaintiff's having relinquished his claim to this animal; for, assuming that, as testified by the plaintiff, the black cow was in fact pointed out to him by the defendant as one of the dowry cattle paid for his daughter, he still had no right to brand it without the defendant's consent pending its delivery to him.

But the remaining inconsistency in the evidence for plaintiff, to which attention is drawn by the Assistant Native Commissioner in his reasons for judgment, viz., that in regard to the dowry transaction in question, seems to me to affect the probabilities to an extent militating against the success of the plaintiff's case as will be apparent from what follows.

The plaintiff's version is that the agreed upon dowry was ten head of cattle of which only one head was still outstanding, viz., the black cow; whereas, according to the evidence given for the plaintiff by his elder brother, the agreed upon dowry was thirteen head of cattle of which the black cow and three other cattle were still outstanding; and this evidence tends to bear out the defendant's version that the plaintiff had asked for thirteen head of cattle as dowry for his daughter, that he (the defendant) had in fact paid only ten head, that the plaintiff had accepted this dowry and allowed his daughter to marry the defendant's son and that it was only a considerable time thereafter that the plaintiff had asked him for a further dowry beast on account of the three head which he had declined to pay.

Then there is a further factor, which, to my mind, also militates against the success of the plaintiff's case, viz., his delay of two years in bringing the instant action, i.e. from the beginning of the year 1953 when, on his return to his kraal from work, he found that the black cow had not been delivered to him until the issue of the summons on the 18th January, 1955; and the plaintiff's explanation for this lengthy delay, viz., that "defendant kept on saying a lot of things to me," strikes me as being singularly unconvincing, and lending colour to the defendant's version that he did not pay the black cow to the plaintiff as dowry but that the plaintiff had asked him long after the marriage for a further dowry beast on account of the three head which the defendant had declined to pay.

It is true that, as pointed out by Counsel for appellant, the Headman, in the course of his evidence for the defendant, stated that, at the enquiry held by him, the defendant had admitted that he had paid the black cow to the plaintiff as dowry but had not been serious when he had done so. To my mind, however, this evidence cannot be regarded as corroborative of that for plaintiff to the same effect as the Headman is clearly not a reliable witness; for he stated earlier in his evidence that at the inquiry held by him the defendant had denied that he had paid the black cow to the plaintiff as dowry; and it emerges from the Assistant Native Commissioner's reasons for judgment that the Headman was most uncomfortable and unhappy whilst testifying and that his evidence "had literally to be drawn from him".

It is also true that witnesses other than the plaintiff's elder brother gave evidence for him and that their evidence supports his case. But then there are also witnesses other than the Headman who gave evidence for the defendant which supports his case. The Assistant Native Commissioner states in his reasons for judgment that he gained the impression that all the witnesses both for the plaintiff and the defendant were not telling the whole truth and it seems to me that on the record there is little to choose between them.

It follows that there cannot be said to be a preponderance of probability in favour of the plaintiff's case and that, as the onus of proof on the pleadings rested on the plaintiff, the absolution judgment entered by the Court *a quo* cannot be said to be wrong.

Accordingly the appeal falls to be dismissed with costs.

A further matter calls for comment, viz., the fact that there are a number of errors in the certified copies of the record. The gravity of failure to ensure that such copies correspond in all respects with the original cannot be over-emphasised as it may result in this Court's dealing with a case on incorrect premises and thereby causing a miscarriage of justice. The Native Commissioner is directed to bring the gravity of this matter home to the officer responsible for the lapse in question with a view to obviating similar defects in the future.

H. W. Warner (Permanent Member): I concur.

R. A. Midgley (Member): I concur.

For Appellant: Mr. F. G. Airey, Umtata.

For Respondent: Mr. G. M. M. Matanzima, Engcobo.

SOUTHERN NATIVE DIVORCE COURT.

WYATT *v.* WYATT.

N.D.C. CASE No. 366 OF 1955.

PORT ST. JOHN'S: 5th June, 1956. Before Balk, President.

Applicability of the definition of "Native" in section thirty-five *of Native Administration Act,* 1927 *to section* ten *of Native Administration Act,* 1927, *Amendment Act,* 1929.

Summary: In an action for the restitution of conjugal rights, failing which for a divorce, the question arose as to whether the defendant fell to be regarded as a "Native" for the purposes of the action.

Held: That the definition of the term "Native" in section *thirty-five* of the Native Administration Act, 1927, as amended, applies to section *ten* of the Native Administration Act, 1927, Amendment Act, 1929; that the defendant fell to be regarded as a "Native" in terms of the definition, and that the Court thus had jurisdiction to determine the action.

Cases referred to:

Rex *v.* Neumann, 1953 (3) S.A. 65 (S.W.A.).

Rex *v.* Radebe and Others, 1945 A.D. 590.

Masholo *v.* Masholo, 1944 N.A.C. (C. & O.) 25.

Harris and Others *v.* Minister of Interior and Another, 1952 (2) S.A. 428 (A.D.)

Mbelle *v.* Mbelle, 1947 (1) SA. 782 (W.L.D.).

Savage *v.* Commissioner of Inland Revenue, 1951 (4) S.A 400 (A.D.).

Rex *v.* Von Zell (2), 1953 (4) S.A. 552 (A.D.).

Rex *v.* Williams, 1952 (4) S.A. 185 (C.P.D.).

Works referred to:

Maxwell on the Interpretation of Statutes. (Tenth Edition).

Statutes, etc., referred to:

Native Administration Act, 1927 (section *thirty-five*) and (sections *ten, twelve* and *twenty-two*).

Native Administration Act, 1927, Amendment Act, 1929, (section *ten*).

Balk (President):

The plaintiff sued her husband, the defendant, in this Court for restitution of conjugal rights, failing which, divorce and other relief.

The action was not defended and the plaintiff, having made out a *prima facie* case, was ordinarily entitled to the relief which she sought.

But, whilst it was manifest from the evidence that the plaintiff is a "Native" in the sense that she is a member of an aboriginal race or tribe of Africa by descent, i.e., a "Native" as ordinarily understood, see Rex *v.* Neumann 1953 (3) S.A. 65 (S.W.A.) and Rex *v.* Radebe and Others, 1945 A.D. 590, and thus in any event fell to be regarded as a "Native" for the purpose of this action, it was not clear to me whether the defendant fell to be so regarded; for it emerged from the evidence that, although his mother was a "Native" in the sense indicated above, his father was a European; and, though, according to the evidence, he lived under the same conditions as a Native in a scheduled Native area, and thus fell within the definition of the term "Native" in section *thirty-five* of the Native Administration Act, 1927, as amended, (hereinafter referred to as "section *thirty-five*" and "the earlier Act", respectively), it was doubtful to me whether this definition obtained in the instant case, in that section *ten* of the Native Administration Act, 1927, Amendment Act, 1929 (hereinafter referred to as "section *ten*" and "the later Act", respectively), which provides for the establishment of Native Divorce Courts, whilst contained in an Act amending the earlier Act, is not specifically stated to be an amendment thereto, but forms a separate section. That being so, it also seemed doubtful to me whether this Court had jurisdiction in the instant action as such jurisdiction is, by section *ten,* restricted to matrimonial causes *between Natives.*

This question was, therefore, raised by this Court *ex mero motu* and, at its request, argued by Counsel for plaintiff. That this was the proper course to pursue in the circumstances is borne out by Radebe's case (*supra*), at page 597. Unfortunately the defendant was in default so that there was no argument on his behalf.

In Masholo *v.* Masholo 1944 N.A.C. (C. & O.) 25, it appears to have been assumed that the definition of the term "Native" in section *thirty-five* applied to section *ten* apparently without this aspect having been considered.

It seems to me that the test to be applied in resolving this question, i.e., whether the definition of the term "'Native" in section *thirty-five* applies to section *ten,* is that cited with approval in Harris and Others *v.* Minister of Interior and Another 1952 (2) S.A. 428 (A.D.), at page 459, namely—

> "That for the sure and true interpretation of all statutes in general (be they penal or benefiical, restrictive or enlarging of the Common Law) four things are to be discerned and considered; 1st, What was the Common Law before the Act? 2nd, What was the mischief and effect for which the Common Law did not provide? 3rd, What remedy the parliament hath resolved and appointed to cure the disease of the Commonwealth? And 4th, The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy."

Dealing with these considerations seriatim, the position prior to the establishment of Native Divorce Courts by section *ten,* was that matrimonial causes between Natives could only be determined in the Supreme Court with the attendant high costs. In order to remedy the matter, the legislature provided less expensive tribunals for the trial of the causes in question by establishing Native Divorce Courts under section *ten,* see Mbelle *v.* Mbelle, 1947 (1) S.A. 782 (W.L.D.), and the cases there cited. It follows that this was the real object of the legislation in question, i.e., of section *ten.*

A person in the defendant's position cannot be regarded as a "Native" for the purposes of any legislation in the absence of a definition of this term similar to that in section *thirty-five* or some other definition including a person falling into the same category as the defendant; for by descent such a person cannot be regarded as a "Native" within the meaning ordinarily attaching to this word, see Neumann's case (*supra*), at page 69, so that, if the definition of the term "Native" in section *thirty-five* does not apply to section *ten*, the defendant is not a "Native" for the purposes of section *ten* and this Court would have no jurisdiction in the instant case, since, as pointed out above, its jurisdiction is, by section *ten*, restricted to matrimonial causes *between Natives*.

But as the defendant is a "Native" for the purposes of the earlier Act, by virtue of section *thirty-five*, it is competent for him to bring or defend actions against other "Natives" in Native Commissioners' or Native Chief's Courts constituted under section *ten* and *twelve*, respectively, of that Act. And, similarly, he is deemed to be a "Native" for the purposes of marriage, see section *twenty-two* of the earlier Act.

It seems to me, therefore, that to advance the remedy which the legislature had in mind when it enacted section *ten*, persons in the position of the defendant should be included in its ambit, and the term "Native" in section *ten*, therefore, properly falls to be construed as defined in section *thirty-five*. Moreover, not to place this construction on the word "Native" in section *ten*, would lead to a result contrary to the intention of the legislature, bearing in mind the presumption that such an intention falls, in all cases of doubtful significance, to be determined in accordance with what appears to be most in accord with convenience, reason, justice and legal principles, so that the construction in question is also justified from this angle, see Savage *v.* Commissioner of Inland Revenue, 1951 (4) S.A. 400 (A.D.), at pages 408 and 409, and Maxwell on the Interpretation of Statutes (Tenth Edition), at page 191. Here it should be mentioned that, as is manifest from what has been stated above, the earlier Act and the later Act are *in pari materia*, i.e., they both, *inter alia*, deal with the constitution of special Courts for "Natives"; and, as there is, to my mind, ambiguity as to the meaning of the word "Native" in section *ten*, it is permissible and proper to refer to the earlier Act to elucidate the position, see Rex *v.* Von Zell (2), 1953 (4) S.A. 552 (A.D.), at page 558. For the same reason it is proper to refer to the long title of the later Act to elucidate the meaning of the word "Native" in section *ten*, see Rex *v.* Williams 1952 (4) S.A. 185 (C.P.D.), at page 191, and the authorities there cited. And from the long title of the later Act it is clear that that Act, as a whole, i.e., including section *ten*, forms an amendment of the earlier Act.

It follows that the definition of the term "Native" in section *thirty-five* applies to section *ten* and that this Court had jurisdiction to determine the instant action.

Accordingly the relief sought by the plaintiff was granted.

For Plaintiff: Mr. Vabaza, Libode.

NORTH EASTERN NATIVE DIVORCE COURT.

MZAMO *v.* MZAMO.

N.D.C. CASE No. 306 OF 1955.

Custody of children upon decree of divorce.

Summary: The parties were divorced on the ground of adultery at the instance of the wife. There was one child of the marriage, a girl aged 3½ years. The child had been in the care of the paternal grandmother in the country. The

husband asked for custody, the child to remain with her grandmother; the wife asked for custody, the child to remain with her in Durban and attend a nursery school while she is at work.

A *Held:*

(1) That when deciding who shall have custody of a child the interests of the child are paramount.

(2) That a judicial officer is entitled to use his own experience in forming an opinion as to what is best for a child.

B (3) That a country environment is superior to a town environment for a Native child.

(4) That the uprooting of a child from an existing to another environment must be taken into account when deciding on its custody.

C *Cases, etc. referred to:*

Katzenellenbogen *v.* Katzenellenbogen, 1947 (2) S.A. 528 (W.).
Fletcher *v.* Fletcher, 1948 (1) S.A. 130 A.D.

R. Ashton, President:—

Appellant was the successful plaintiff in an application for a D decree of divorce on the grounds of her husband's adultery.

A decree was granted with forfeiture of the benefits of the marriage on the 8th November, 1955, and the question of the custody of the minor child of the marriage was postponed to the 8th February, 1956. On this date the following order was made E after argument and consideration of a report from an Investigating Officer of the Department of Social Welfare:—

"Custody of the one minor child is awarded to defendant until further order. The child to remain with her paternal grandmother. The plaintiff to have access to the child at all J reasonable times while in the custody of defendant."

It is against the order of custody only that appeal is lodged.

Facts found to be proved:

1. That appellant and respondent are Natives and were granted a decree of divorce on the 8th November, 1955.

G 2. That Maureen a daughter of the marriage was born on the 15th December, 1951, and was left by the plaintiff, on her departure to work in Durban, in the care of her husband's mother Rachel Mzamo in March, 1953, and the child is still there.

H 3. The home circumstances of respondent's mother are such that the child could be well looked after if she were placed with her.

4. Appellant is working in Durban as a nurse and her duties make it impossible for her to be with her child during I the day-time.

5. Respondent has been transferred from Durban since the Welfare Officer's report was written.

Grounds for finding of facts:

Facts numbered 1, 2 and 4 are not disputed. Fact numbered J 3 appears from the report of the Welfare Officer and was not challenged while fact numbered 5 was communicated to the Court by counsel in argument.

Reasons for the order made:

The Court was guided by the principles laid down in the cases K of:

Katzenellenbogen *v.* Katzenellenbogen, 1947 (2) S.A. 528 (W.), and Fletcher *v* Fletcher, 1948 1 S.A. 130 (A.D.).

Appellant of her own free will left the child with her mother-in-law on a farm in the Ixopo District and went to Durban to L pursue her studies with a view to taking up nursing which she

has done. The child had accordingly been in the mother-in-law's care for nearly three years when the order for custody was made.

In Fletcher's case at page 137 Centlivres, J.A. stated:—

> "In my view the danger entailed in uprooting children of tender years from an existing environment and placing them in another environment is an element to be taken into consideration when deciding as to their custody but it is only one of the elements and due regard must be had to other considerations as well."

The environment from which appellant sought to remove her child was one she had chosen herself and was Naitve and rural while the environment to which she sought to take her was in a city where Natives live under conditions which are largely foreign to them. The proposed removal also involved taking the child from her grandmother's farm and placing her in a Nursery School at the tender age of four years. A further result of the proposed removal would be that the child, though in her mother's care would hardly ever see her mother as she would be away all day and the child would probably be asleep when she came home.

In the Katzenellenbogen case the "guilty" father had made suitable arrangements for the minor child of the marriage and the Court granted him the custody as against the innocent wife who worked all day and would have to leave the child in the care of a servant.

It was held in the Fletcher case that the innocence of one of the parents of a minor child comes into account only when it is not clearly established what is best for the child. In the present case the Court considered that it was clearly established what was best for the child and the order was made for her custody to be awarded to her father and she was to remain with his mother. Both parties will in the circumstances be able to have similar access to the child.

In regard to paragraph 4 of the grounds of appeal, there may have been no evidence to the effect that a country environment was superior to a town environment but the parties are Natives and the Court considered itself entitled to use its experience as a Native Commissioner in rural and urban areas in Natal (including Durban itself) to decide what environment it considered best for the child.

The judgment of the Court was successfully taken on appeal and the following is the judgment of the *Natal Provincial Division of the Supreme Court* as delivered by Broome, J.P., on 30th April, 1956, at Pietermaritzburg:—

Broome, J.P.: In November last a Native Divorce Court granted a decree of divorce in favour of appellant, the wife, on the ground of adultery. The question of the custody of the minor child of the marriage stood over until 8th February, when an order was made in the following terms:—

> "Custody of the minor child is awarded to defendant until further order. The child to remain with her paternal grandmother. The plaintiff to have access to the child at all reasonable times while in the custody of defendant."

This is an appeal from that order. As we are concerned only with the question of custody, I shall refer to the parties as the mother and the father respectively, the mother being the plaintiff in the trial Court and the appellant here.

The trial court had before it a report from the Department of Social Welfare which gives an account of the various persons who figure in the case, viz., the child; her paternal grandmother referred to in the Court's order above quoted, the Rev. Zulu who is married to the mother's aunt and who, it was given in

evidence, is prepared to provide a home for the mother and child; and the parties themselves. It will be convenient to quote the relevant portions:—

"Maureen (this case) is their only child. She is said to have been born on 15th December, 1951, at Dundee. She parted with her mother when she was about a year old in 1953. Ever since the child has been, and is still living with her paternal grandmother in the Ixopo district. On 1st December, 1955, Maureen was brought before me. She appeared clean, in normal health and adequately clothed.

Rachel (born Mapumulo) Mzamo is the paternal grandmother. She is sixty years of age, was born at Adams Mission Station and has passed Std. VI. She is a widow and is a member of the Anglican Church. She owns two farms, runs a dipping tank and earns about £120 per annum. Her economic circumtances are considered very satisfactory. She lives in a five-roomed house of brick and zinc and owns four other huts and she states that they are adequately furnished. She has servants. Rachel appears to be of a good disposition.

Rev. Alpheus H. Zulu, the maternal relation of this child, is a very popular minister in the Durban community. He is associated with several charitable organisations and is considered to be one of the few successful social workers in the country. Rev. Zulu possess a University degree, is a minister in the Anglican Church in Durban and is stationed at the Anglican church in Carlisle Street. He is financially well-off, lives in a decent modern house with his family and under conditions suitable for the welfare of children. He is of good reputation.

Raymond, the father, was born on 5th September, 1927, at Umzinto and grew up in the Mhlabashana area. He matriculated at Adams College in 1949 after which he became clerk in the Pietermaritzburg's Native Administration Department, earning £15 per month until June 1951.. In April 1954 he completed a course in health visiting. Thereafter he was employed at the Newlands Health Centre at £26 per month and was later transferred to the Springfield Health Centre where he is working and is earning £28. 13s. 4d. per month. Raymond has a room in Overport for which he pays £2. 17s. 6d. per month rent. He states that he lives by himself in this room. He dresses well, appears clean and reports that he plays soccer. does not drink or smoke and saves about £6 per month. He appears to be of sober behaviour.

Magdalene, the mother, was born on 6th April, 1928, at Nqutu in Zululand. Her parents are members of the Anglican Church. are qualified school teachers and are both still teaching. She qualified as a nurse at the Sir Henry Elliot Hospital in Umtata, Cape Province, during 1950. Thereafter she worked at the Mountain Rise Hospital in Pietermaritzburg, then at Ladysmith General Hospital and in 1953 she came to work at the King Edward VIII Hospital, Durban, where she is still working. She earns £28 per month and saves £10 per month. Magdalene lives at No. 561 Gletselands, Reunion and does not pay rent but contributes towards the purchase of food for the family. She regularly attends the Anglican Church Services on Sundays and appears clean in her clothes. She impresses me as being of normal disposition."

This report indicates that the mother and father are both well educated people of good economic standing, and well able to provide for the child's material welfare. An award of custody to the mother is recommended, but the trial Court did not act on the recommendation. The paternal grandmother gave evidence and apparently impressed the trial court as a suitable person to have the care of the child. On the other hand the evidence

showed that the father had an illegitimate child by the woman with whom he committed adultery and that he had since formed a liaison with another woman.

The learned President's judgment and reasons indicate that three factors particularly influenced him in making the order of custody which is appealed against: (1) The danger of uprooting a child of tender years from an existing environment, (2) the fact that the mother, if given the custody, would be unable to be with the child owing to her duties as a professional nurse, and (3) the advantages of a rural environment as against an urban environment. The first factor is certainly one of great weight. The child has been with her paternal grandmother since she was fifteen months old. That is the only home she has ever known. If she is well looked after there, as she is, it would be a pity to move her. But other considerations must not be overlooked. If the child remains with her paternal grandmother she will see little of either of her parents. Whom will she have to take the place of her mother? The paternal grandmother is sixty years of age and clearly too old, in her daily contacts with the child, to fill the role of mother. And I point out here that Mrs. Zulu is only 38 years old and so much more suitable in this respect.

The second factor, viz. that the mother's nursing duties would keep her away from home during the day time, does not impress me. This is necessarily the situation in many homes. Provided the child is properly looked after while the mother is working, as will happen if the mother and child live with the Rev. and Mrs. Zulu, that arrangement is in my opinion much to be preferred to the removal of the child from all contact with the mother.

Mr. Muller for the appellant argued strongly against the third factor which influenced the trial court, viz. the superior advantages of a rural environment. Of this, he pointed out, there was no evidence whatever and the learned President was not entitled to take judicial notice of it. I think Mr. Muller goes a little too far. This is not a question of the court having wrongly taken judicial notice of an unproved material fact. It is a question of opinion. A judicial officer who has to decide upon the best interests of a child is bound to form an opinion upon the proved facts in the light of his own knowledge and experience as a man of the world. In my view the learned President's approach was quite proper and his opinion is entitled to respect. The only legitimate criticism is perhaps that as the question of the rival advantages of rural and urban environment was not raised at the trial the court may have been deprived of relevant information. But however that may be there seem to me to be other considerations here which out-weigh the superior advantages of a rural environment. One is the fact that both father and mother are persons of education whose future lives are bound to be spent in an urban or semi-urban environment. It is reasonable to suppose that but for the divorce they would have brought up their child in a similar environment. And it is in that sort of environment that the child, when she gets older, will probably visit her parents from time to time. If she grows up in the country she will be removed one step further from intellectual and cultural contact with her parents.

After much anxious consideration I have come to the conclusion that the important factors in this enquiry are these. (1) The child's material welfare will be ensured which ever parent has the custody. (2) Any order which might result in the child's losing contact with either parent, and particularly with the mother, is to be deprecated. (3) Having regard to the sex and tender age of the child, the mother's claim is *prima facie* stronger than the father's from the point of view of the child's best interests (not merely her material interests). (4) The mother is the innocent party. In the circumstances of this case, where the child's material welfare will be ensured with either parent, this factor has more weight than it usually has. (5) The father has committed adultery with one woman and has formed a liaison with another. After weighing up all these considerations I find

that the balance is on the side of the mother, and that the trial court's award of the custody to the father was wrong.

On the 8th November the trial court granted a decree of A divorce and forfeiture of benefits, with costs. That order will of course stand. The question of custody was postponed to 8th February. There was a claim for maintenance at the rate of £3 per month which fell away when custody was awarded to the father. The notice of appeal does not attack the trial court's B failure to award maintenance, and in evidence the mother said "I just want my husband to feel that it is his duty to support the child as a father. Actually I do not care whether I get the support or not." In these circumstances we think it best to leave the question of maintenance open.

C The appeal is allowed with costs, and the order of the trial court is altered to an award of custody of the minor child to plaintiff until further order, defendant to have access at all reasonable times, defendant to pay plaintiff's costs on and after 8th February, 1956.

D Caney, J.: I agree.

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